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A

SUCCINCT VIEW

OF THE

Rule in Shelley's Case;

EXHIBITING,

By negative and affirmative Propositions, the Instances in which *several Limitations*, one to the *Ancestor*, the other to the *Heirs*,—the *Heirs of the Body*,—or *Issue of the Body* of that Person, do and do not give the Inheritance to the Ancestor.

By RICHARD PRESTON,

OF THE INNER TEMPLE,

Author of the *Elementary Treatise on the Quantity of Estates*.

Inest sua Gratia parvis.

E X E T E R :

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TO
THE HONORABLE
SIR FRANCIS BULLER, BARONET,
ONE OF THE JUSTICES OF HIS MAJESTY'S COURT
OF KING'S BENCH AT WESTMINSTER;
A SEAT WHICH HE FILLS WITH DISTINGUISHED
HONOR TO HIMSELF, AND WITH THE GREATEST
ADVANTAGE TO THE COMMERCIAL
INTERESTS OF THIS KINGDOM;

THIS ESSAY

IS,

BY HIS PERMISSION,

AND

WITH A HIGH SENSE OF THE FAVOR CONFERRED
BY THAT PERMISSION,

HUMBLY AND RESPECTFULLY

INSCRIBED

BY

HIS VERY OBLIGED AND OBEDIENT

SERVANT

THE AUTHOR.

P R E F A C E.

THE Liberality, indeed the Generosity, of the Profession, displayed in their Reception of the Elementary Treatise, by Way of Essay, on the Quantity of Estates, and the favorable Opinion expressed of that Essay in the *Monthly, Critical, and Analytical* Reviews, and by several Gentlemen of distinguished Abilities, have raised, in the Author of that Work, a Wish to make the same still more acceptable to the Profession; and he has now employed about ten Times as much Labor in revising, correcting, enlarging, and improving that Essay, as he imparted to prepare the same for its first Publication. In the Revision of that Work, he observed, that, in treating of the Doctrine on *Freeholds*, he has been silent on the Rule in *Shelley's Case*; and that in the

Chapter on *Estates in Fee*, he has noticed this Doctrine in very general Terms, without shewing its Application by Examples, or introducing the Instances which are allowed to be Exceptions to the Rule, framed from this Learning. The Truth is, that, at the Time he compiled the Essay on Estates, he did not find himself equal to the Task of introducing and observing on this Rule to his own Satisfaction ; and it was not till a very recent Period that he made the Attempt ; and he made it with great Doubt of his Abilities to exhibit the Scope and Extent of the Rule, in a Manner, that, even in his own Opinion, would make his Labors useful, as connected with, and embracing Part of, the Subject of his former Treatise, and elucidating some of the Points immediately relevant to the Learning discussed in that Treatise.

His Success however, was beyond his Expectation, tho' by no Means equal to his Ideas of Perfection. He is aware that
the

the Rule is still capable of far greater Illustration. Of this he is fully persuaded, from the Observations he has already made. In his own Hands, this Essay has been increasing in Size, from Time to Time—At first, it was comprised in a few Pages, even 3 or 4; and it has increased into its present Bulk by small Degrees.

All that he aimed at, in the first Place, was to suit his Observations on this Rule to the other Parts of his Essay on Estates; into which, on a Republication of that Book, this Rule will be introduced.—In the mean Time the following Observations are offered to the Profession, in their present detached Form, without any other Expectation, on the Part of the Author, than that they will afford some Proof, that the Success of his former Publication has not rendered him indolent or inattentive.

A Partiality for the Profession, and its Practice in the *Conveyancing Line*, will al-

ways excite his Industry; and, if in the Course of the Publication of the several Essays he has in Contemplation, and about which he is now engaged, he shall deserve well, in any Degree, from those, for whose Use his Works are designed, he will, in reflecting on the Pleasure and Satisfaction naturally arising from the good Opinion of his Friends, and the Consolation that he hath not been an useless Member of Society, wholly forget the Labor: and assure himself that Society cannot be more effectually served, than by shewing the Means to be pursued, in Order to the Settlement, and, its Consequence, the peaceable and secure Enjoyment of Property, free from Litigation; which so materially affects the Repose and Comfort of those who are interested in the Event.

In Excuse for the Errors into which he has fallen, he may still plead his *Youth*;—and he is too sensible of his own Inability, to give a complete Treatise on the Subject
of

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of this Essay, not to avail himself of every Circumstance that can intitle him to Indulgence.

Inner Temple, 1st May, 1794.

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IN this Work there remain some typographical Errors. They are few in Number, and do not affect the Sense. The Reader is requested to correct them, and also to supply an Omission of the Author in stating the Case of Hayes and Ford (Page 59) ; in which the Devise, by the Will, was to the *Heirs Male* of N's *Sons*,—and not to N's *Sons*. The Insertion of the Words “ *the Heirs Male of* ” immediately after the Word “ to,” and before the Word “ his” in the 14th Line of that Page, will make the Statement correct, and shew the Grounds of the Conclusion drawn from this Case.

ON THE

Rule in Shelley's Case.

THE subject of this Essay is, professedly, the Rule in *Shelley's Case*; (a) and the end proposed, is, by negative and affirmative propositions, to exhibit, in a discussion of that Rule, the instances in which *several limitations*, one to the *ancestor*, the other to the *heirs*,—heirs of the *body*,—or *issue* of the body of that person, do and do not give the *inheritance* to the ancestor.

It is a Rule immediately relevant to the doctrine on estates of *freehold* and *inheritance*, and under particular circumstances, involves in a material and very interesting point of view, the law on the construction of words of *limitation* in *deeds*, *wills*, and other writings, such as *declarations*

(a) 1 Co. 93.

tions of uses, appointments in pursuance of powers, &c. It may be expressed in these words,

When a person takes an estate of *freehold*, *legally* or *equitably* under a *deed*, *will*, or other *writing*, and, afterwards, in the *same* deed, will, or writing, there is a limitation, by way of *remainder*, with or without the interposition of any other estate, of an interest of the same *quality*, as *legal* or *equitable*, to his *heirs* generally, or his *heirs* of his body; by that name in deeds or writings of *conveyance*, and by that or some such name in wills, and *as a class* or *denomination of persons*, to take in *succession* from *generation to generation*; the limitation to the heirs will intitle the person or ancestor himself to the estate, or interest, imported by that limitation; or in other words (for so the Rule has sometimes been proposed) “ wherever the ancestor takes an
 “ estate of freehold, or franktenement, and an
 “ immediate remainder is thereon limited, in
 “ the same conveyance, to his heirs, or heirs
 “ in tail, such remainder is immediately executed in possession, in the ancestor so taking
 “ the freehold, and therefore is not contingent
 “ or

" or in abeyance." (b)—Or, still more accurately " where the ancestor takes an estate of " freehold, by any gift or conveyance ; and in " the same gift, or conveyance, there is a limitation, either mediate or immediate, to his " heirs, or heirs of his body, the word heirs is " a word of limitation of the estate, and not of " purchase ;" (c) by which it must be understood that it is not a designation of persons, to take *originally* in their *own* right.

The Rule has also been expressed, perhaps with still greater precision though not with equal elegance, by a very able lawyer to be " That in " any instrument, if a freehold be limited to " the ancestor for life, and the *inheritance* to his " heirs, either *mediately* or *immediately*, the first " taker, takes the whole estate ; if it be limited " to the heirs of his body he takes a fee-tail ; if to his heirs a fee-simple." (d) In this proposition the Rule assumes the fact to be, that the *inheritance* is limited to the *heirs*, and, therefore, it

(b) Fearne. (4 Editn.) 30. 2 Roll. Abr. 417. 1 Co. 104. *Shelley's Ca.* 1 Inst. 22. b.

(c) Fearne 30. 103. 2 Roll Abr. 417. 1 Rep. 104. *Shelley's Case.* Brook *Done*, &c. pl. 11. Same *Nosme* pl. 1. 40.

(d) Per Serjt. Glynn in *Perrin and Blake*.

it expresses the legal application of the Rule, more clearly, than those positions, in which it is stated, generally, that the second limitation is to the heirs: for the very ground and principle of the Rule, is that the *heirs*, as such, are, in point of *intention*, to have the *inheritance*, *quatenus* they are the *heirs* of the *ancestor*. (e)

The same observation may be made on the first of these definitions; for the accuracy of which the writer of this Tract is answerable.— In that definition, keeping in view the opinion of Lord *Thurloze*, delivered in *Jones and Morgan*, (f) he has proposed, that the limitation must be to the heirs, as a *class* or *denomination* of persons, to take in *succession*, from generation to generation; and this is, in terms, to say that the *inheritance* must pass under the limitation to them.

So that the Rule analysed, requires

First—That there shall be an estate of *freehold*.

Andly.—That there shall be a limitation to the *heirs*, or heirs of the body, of the person taking that estate; by that, or some such substituted, Name.

(e) See *White* and *Collins* *infra*.

(f) 1 *Browns Ch. Ca.* 206.

3dly.—That these heirs shall be named, to take as a *class* or *denomination* of persons.

4thly.—In succession, from generation to generation.

5thly.—By way of *remainder*, and so that the estate, to arise from the limitation to the *heirs*, and the estate of freehold in the *ancestor*, shall *both* owe their effect to the *same* deed, will, or writing.

And lastly, that the *several* limitations shall give interests of the same *quality*: both *legal*, or both *equitable*.

Leaving it indifferent,

First, Whether the limitation to the *heirs*, is to give an interest, to take place immediately after the determination of the ancestor's estate of freehold, and consequently connect itself with that estate, and, by *merger* thereof, form one entire interest; or to take place at a remote period; waiting *for*, and continuing expectant *on*, the *determination* of

of some *other* estate, limited in remainder of the ancestor's estate.

2^{ndly}. Whether the limitation to the *heirs* is to give a *vested* or *contingent* interest.

At least, if these are not inferences arising fairly out of the *definition* of the *Rule*, they will be found fully warranted by the *cases* from which the *Rule* is to be collected; without any exception to the generality of these deductions, besides the case proposed by Mr. *Fearne* of an estate of freehold, with a power of appointment to uses, in one deed, and an execution of that power by another deed, in favor of the heirs of the person to whom the freehold is limited by the *first* deed; (g) and those cases which will be noticed in the sequel, as not within the extent of the *Rule*, or, for particular reasons, exempted from its influence, by the interposition of a court of *equity*.

These deductions, it must be observed, are conclusions from the following parts of this essay. They are introduced, in this place, to open the
scope

(g) *Fearne* 99.

scope of the Rule at one view, and in an early part of this publication. The Author feels abundant reason to make this remark, to excuse himself for having treated the subject, without a strict regard to this arrangement.

For introducing so many definitions of this Rule, an apology may also be necessary. One motive to this conduct, was to shew the various means, used by different persons, to convey their sense of the scope and application of the Rule. Another motive originated in the hope, that the impression to be made by the several definitions, would be more strong, than that which would be communicated by either, singly. It was also thought that the comparison which must be made of the several definitions, to observe the circumstances under which they exhibit the Rule, would be the most certain way, at the same time, to inform the judgment, and assist the memory.

The extent and importance of this Rule, the variety of cases which it embraces, the doubts entertained on its extent and application, and the nice distinctions, and numerous exceptions

B

of

of which it admits, render the consideration thereof a task of great difficulty. An attempt, however, will be made, though with diffidence and doubt of success, to exhibit the rule, in a point of view, sufficient to awaken the attention of the reader; give him an outline of the doctrine; and interest his wishes, so far as to raise in him a desire of extending his researches, into the elaborate and highly valuable Treatise of Mr. *Fearne*, on *contingent Remainders*; from whose judicious essay on that subject, the greater part of the doctrine on this Rule is collected. The persuasion that the *Essay on the Quantity of Estates*, already before the Public, and particularly the chapter on *Freeholds*, is defective, for want of the learning of this rule, is the best apology that can be made, for offering a separate and distinct essay on the principles and outlines of which the rule itself is composed. However, some hope is formed, that the succinct and collective view, and also the manner and arrangement, in which the rule is exhibited in this essay, will assist the student, in reading the more extended and laborious works of Mr. *Fearne*; and that this essay may have its utility, after that book is read, in calling
the

the detailed and cogent reasons of that gentleman to memory; serving as a synopsis to his work.

Moreover, it may have the effect, and a very desirable one it will be, of preparing the reader to enter on the laborious works of Mr. *Fearne* with some previous insight into the subject, and with that general knowledge of the application of the rule, and of the exceptions to the same, which will be a means of assisting him to see the full force, the reason and the extent of that gentleman's conclusions, and of the cases he has introduced, in elucidation or support of his positions, or on which he has offered his sentiments with so much energy and judgment.

The importance of a thorough knowledge of this rule will be evident, from the consideration, that the power of *alienation* by the ancestor, to a *total* or *partial* exclusion of his *relations*, coming under the denomination of his *heirs*, in the descriptive terms of the limitation which names them, is, very frequently, to be ascertained through the medium, and by the application of this rule. In those instances to which the rule

applies, the ancestor has this power of alienation; for the inheritance is *in him*, and *his children* or other *relations*, so far as their right is founded upon the limitation to *his heirs*, can claim only in succession from him, and, therefore, will be bound by his acts; while in those instances to which the rule does not apply, the *children* or other *relations*, falling under the denomination of *heirs*, have a title *originally*, in their *own right*, and as *purchasers* by that *name*, and do not claim through or under their ancestor, further than as persons described by means of his *name*, and as his heirs: in other words, as the persons in whom this character is to be fulfilled, and therefore their ancestor, merely because he bears that relation to them, cannot, by his alienation, make any disposition to their prejudice.

Before any observations are made on the immediate application of the rule, it will be right to premise, that the same is of positive institution, and has this circumstance of peculiarity and variance from rules of construction in general, that, instead of seeking the *intention* of the parties, and aiming at its accomplishment, it interferes in *some* at least, if not in *all* cases with
the

the *presumable*, and, in many instances, the *express* intention. In its very object, it was levelled against the views of the parties. Hence, has arisen the great difficulty, of deciding the questions which involve the consideration of the rule. To determine whether the operative force of the rule, or other rules of construction which take the *intention* of the parties for their guide, shall prevail, is, generally, the point to be decided. It is much and seriously to be lamented, that a line cannot be drawn so nicely, as to enable a distinction to be clearly taken, discriminating those cases that are, and those cases that are not, the objects of the rule.

Every case must in all *instruments*, and especially in *Wills*, in a great measure, depend on its *particular* circumstances. The question in these cases will always be, which of the two rules, the one in *Shelley's Case*, or the one that regards the intention, shall be applied to determine the legal effect of the *several* limitations, to the *ancestor* and his *heirs*; and in the progress of the observations to be offered in this essay, it will be attempted to trace the rule in *Shelley's case* to its principle, and thereby shew its force and extent, in the

clearest point of view, that it can possibly be exhibited.

To begin with the outlines of the rule, it must be called to remembrance, that in *Perrin and Blake*, (b) Lord Mansfield said, "The rule is not
 " a general proposition, subject to no controul,
 " where the intention is on the other side, and
 " where the objections may be answered." And he agreed with Justices *Wilmot* and *Aston*, that
 " The intention is to govern, and that *Shelley's*
 " Case does not constitute a decisive uncontroul-
 " able rule."

And that great Lawyer to whom this Essay is inscribed, in the well considered opinion he delivered on the case of *Hodgson and Wife v. Ambrose* (i), which involved the discussion of this Rule, to the observation that "If a testator
 " makes use of legal phrases or technical words
 " only, the Court is bound to understand them
 " in their legal sense, and that they have no
 " right or power to say, that the testator did not
 " understand the meaning of the words he has
 used,

(b) 4 Burr. 2579. 1 Collectanea Juridica.

(i) Doug. Rep. 327.

“ used, or to put upon them a construction,
 “ different from what has been long received or
 “ what is affixed to them by law,”—added the
 following distinction,—“ But if a testator use
 “ *other words*, which manifestly indicate what his
 “ intention was, and shew, *to a demonstration*, that
 “ he did not mean what the *technical words im-*
 “ *port*, in the sense which the *law* has *imposed*
 “ upon them, that intention must prevail, not-
 “ withstanding he has used such *technical words*
 “ in other parts of the will.” (k)—And that the
 “ operation of words must arise from the sense
 “ they carry,” was a remark of Lord *Hard-*
wicke's (l); and “ that sense,” Mr. Justice *Buller*
 has very judiciously observed, “ can only be found
 “ by considering the whole will together (m).”
 And in this place, it will be right to attend to a
 distinction, which will be a clue for solving all
 questions of ordinary difficulty, and the point
 of this distinction is that the rule extends to
 those limitations only, in which the *heirs* of the
 person, to whom a previous estate of freehold is
 given, are, by the *manifest intention* of the par-

B 4

ties,

(k) Doug. Rep. 327.

(l) In *Bagshaw and Spenser*, 2 Atk. 583.

(m) In *Hodgson and Ambrose*.

ties, to take *under that appellation*, and that appellation embraces *all* the heirs of the *given description*, and the limitation has *these heirs* alone, and no others of a different class, nor the *heirs* of the *heirs* as *individuals* (thereby distinguishing between the heirs of the *ancestor*, and the heirs of the *heirs*) for its *object*: and it extends to cases of this description, as often as these *heirs* are, immediately after the decease of their ancestor, to be entitled in the same manner, and to the same extent of interest, and to an estate exactly with the same descendible qualities, as they would take from their ancestor, if the limitation was to *him* and his heirs &c, even though it is the *intention* of the parties, that these heirs shall take by *purchase*, and not by descent, and that the estate of the ancestor shall never, in any event, be *enlarged* by the limitation to his heirs:—For as, in several sentences, connected in sense though detached in expression, it was emphatically said by Lord *Thurlow* (*n*), in declaring his sense of the application of this rule, “Where the *heir* “takes in the *character* of *heir*, he must take in “*quality of heir*.”—“By all the cases where the “estate is so given, that after the limitation to the

(*n*) *Jones and Morgan*, 1 *Brown. Ch. Ca.* 216.

“ the first taker, it is to go to every person who
“ can claim as heirs to the first taker, the word
“ heirs is a word of *limitation*.”—And again,
“ All heirs taking as heirs, must take by *descent*.”

This is the principle, the leading object, and characteristic feature of the rule, which the reader will perceive is confined to those instances in which the several limitations have this view, and are merely of this description : for, as has been already noticed, the rule is not so strict, as to controul the *manifest* intention, if that intention steers clear of the *reason* of the rule, or of its *literal terms*. The most strenuous advocates for a proper and legal application of the rule, must admit, that the intention is to be collected, and, if clearly expressed, to be observed ; and after the intention is fixed, the law decides upon it without ambiguity ; allowing the intention to govern, as often as it is clear that the word *heirs* is not used, as descriptive of the *whole class* of legal *successors* ; but in *designation* of an *individual*, or of *particular* persons. The intention, to be observed, in exclusion of this rule, must be expressed in *terms*, manifestly exhibiting clear evidence to the mind, that the heirs are
not

not to take merely in that *right*, and as answering that description. The enquiry, then, must be directed, to discover the intention, and to see whether the same is clear of the reasons upon which the rule depends for effect: For as Lord *Hale*, a character of the first respectability, very pertinently observed in *King and Melling* (o) in reference to wills, the *intention* is to be *law* to expound the testament.—“The true ground of
 “decision is the intent, and the true question is,
 “what is the intent, and the interpretation is to
 “shew the intent.” And as Mr. Justice *Buller* (p) with equal propriety, and with much greater perspicuity and precision, observed, in construction of the same sorts of instruments, “There is no
 “rule better established than that the intention
 “of a testator, *expressed* in his will, *if consistent*
 “*with the rules of law*, shall prevail.” “That is
 “the first and great rule in the exposition of all
 “wills;—and it is a rule to which all others must
 “bend.” It says, “*if consistent with the rules of*
 “*law*,” “but it must be remembered that these
 “words are applicable only to the *nature* and
 “*operation* of the *estate* or *interest* devised, and not

“to

(o) 1 Vent. 214. 225. 2 dev. 59.

(p) In *Hodgson and Ambrose*.

oddly expressed
 whether in rela-
 tion to his charac-
 ter as a judge or
 as a lawyer.

“ to the *construction of the words*. The question
 “ whether the intent be consistent with the rules
 “ of law or not, can never arise, *till it is settled*
 “ *what the intention was*. This can only be dis-
 “ covered by taking the whole together.—If it
 “ be apparent, I know of no case that says a
 “ strict legal construction or a technical sense of
 “ *any words whatever*, shall prevail against it,
 “ unless a case (q) which made a great noise in
 “ Westminster Hall a few years ago, be confi-
 “ dered as such. If the intent does not *plainly*
 “ *appear*, I agree that the legal sense of the words
 “ must prevail ;” and applying his observations
 to the case of *Hodgson and Ambrose* then before the
 Court of *King’s Bench* for their opinion on the effect
 of a devise, which, to state the same briefly, was
 “ To the use and behoof of C. and her assigns
 “ for and during the term of her *natural life*,
 “ and from and after the determination of that
 “ estate, to the use of *Trustees* therein before
 “ named, and their heirs, *during the life* of the said
 “ C. upon trust to support and preserve the *contin-*
 “ *gent uses* and estates therein after limited, from
 “ being defeated, or destroyed : and for that pur-
 “ pose to make enteries and bring actions as
 “ the

(q) *Perrin and Blake*.

“ the case should require, but nevertheless to per-
 “ mit and suffer the said C. and her assigns,
 “ during her life, to receive and take the rents,
 “ issues and profits to and for her and their own
 “ use and benefit. And, from and after her
 “ decease, then to the use and behoof of the
 “ *heirs of the body of the said C. lawfully issuing;*”
 And observing that if there had been no devise
 to trustees, the case would be so plain that no
 man could doubt about it,—he propounded this
 question “ What then is the nature of such
 “ devise to support *contingent remainders,*” and he
 answered the question, saying, “ it is a legal and
 “ technical limitation, the peculiar language of
 “ conveyancers,” — and continued to observe
 “ the effect of this sort of limitation in a deed,
 “ is settled. There is not sufficient to turn *words*
 “ of *descent,* into *words of purchase.* The testa-
 “ trix has not shewn, by any *other words,* that she
 “ meant to use the technical expressions in a dif-
 “ ferent sense from what the law has put upon
 “ them, and, therefore, the *legal sense* must pre-
 “ vail.”—“ It seems to me to be false logic, to
 “ put a different sense on any words from what
 “ *in general* they import to bear, by *mere inference*
 “ from the *words themselves,* *unexplained* by
 any

“ any *others* : though if other words manifest the
“ intent I know of no law that says the intent
“ shall not prevail.”

In weighing the force and application of this rule, the proper inquiry, in order to the exposition of words of limitation to the heir or heirs, &c. in doubtful cases, is *first*, whether these words are used to comprehend *all* the persons who shall *successively* answer the description, and consequently, shall be words of *limitation*, to enlarge the ancestor's estate ; or are used as words of *purchase* ; that is, words describing *particular* persons as *individuals*, to take in their *own right* ; *secondly*, what is the legal import of these words, considered as words of *purchase* : and *thirdly*, whether the intention is *manifestly clear*, that the words shall have the *particular effect* of describing *particular* persons, rather than, and in direct exclusion of the construction that would be affixed to them, by allowing them to be affected by this rule ; under which they will be held to extend, to *any heirs* of the given description, collectively, as a *class* of persons : for unless there is such *direct intention*, plainly and clearly expressed, the rule must take place. Still the difficulty exists, of
ascertaining

ascertaining those words and expressions which are sufficient to indicate such direct intention; and this is a difficulty that can never be totally removed.

To these observations it must be added (and these observations are in truth, necessary conclusions from the positions already advanced) that it is not sufficient, that the intention shall depend on *inference* or *presumable reasons*: it must be manifested by words which are explicit; and words too. that, without any infringement of the rule in *Shelley's Case*, at least the *reason* and *spirit* of that rule; if not in its *literal terms*, may be construed to be a designation of *particular persons*.

The difficulty that has been mentioned does not, in any degree, question the existence of the rule—It does nothing more than point to cases that leave room for doubt on its application.

To obviate this difficulty in some degree, and to elucidate and enforce the observations that have been made, it will not be foreign to the purpose of this essay, to review in detail, the effect of a limitation to the *heirs* or *heirs of the*
body

body of an individual, under which the persons who shall sustain this character are to be purchasers.

In case the limitation is to the *heirs generally*, the person who answers that description, at the time when the limitation is made, otherwise the person who shall *first* answer the same, will have a fee;—whether descendible to him and his heirs generally, or with a restriction to those heirs who are of the *blood* of his *father*, in those instances in which the limitation is to the right heir of a *man*, is not clearly ascertained; nor is it in any wise material to the point under consideration. Of the extent and descendible qualities of the estate that passes by a limitation in these words, some notice will be taken in the next edition of the Essay on Estates.

The observations that have ^{been} made on a limitation to the right heirs of a person, are equally applicable to a limitation to his heirs of his body, with this distinction, though the limitation will vest *all the estate* imported by these words, in the person who first fulfills the character of *heir* according to the terms of the gift, yet it does not
not

not exclude those persons, who, by any possible event, may, at a future period, bring themselves within the same description (*r*). All persons *successively* answering that description may take under this gift; for they are within the terms, and therefore shall derive the advantage, of the same. The estate is wholly in the first taker with a *descendible*, or, more accurately speaking, a *transmissible* quality, that will let all successive heirs of the body of the given person, tho' related to the first taker only in the *collateral line*, into its measure and extent: and so complete an owner of *all* the estate, is each successive taker, that he may defeat the right of every other person falling within the terms of the limitation. All the heirs of the body of the person to whose heirs the limitation is made, take precisely in the same manner, and with the same degree of interest, and in the same relative situation, as if the estate had vested in their ancestor, under a gift to him and his heirs of the given description. The heirs succeeding from time to time, *collaterally* to the *first taker*, do not take by way of *remainder*; nor does the person in whom the character

(*r*) *Mandeville's Case*, 1 inst. 26. b. Wills and al. v. Palmer, 5 Burr. 2615. 2 Black. Rep. 687.

character of heir is first fulfilled, take the same limited degree of interest, as if the gift was to *him* and *his* heirs of *his* body. His *brothers* and *sisters* are within the extent of the limitation, and they may take in succession. Neither do they take separate and *distinct* estates. Their only ground of claim is that the measure of the estate does, in its comprehensive terms, embrace persons of their description, and confer a right on them. Strictly speaking, they do not take by *descent*; for they do not claim under the person, in whom the estate first vests, as their ancestor; nor can they, with any precision, be said to take by *purchase*; for then they would take separate and *distinct* estates. They take in a *mixed right*: in a right that cannot be easily defined, by a *quodam modo* *descent*; a descent *per formam doni* under the statute of entails: and when a limitation to heirs or heirs of the body *taken separately*, confers an interest of this nature, then it is, that *connected* with an *estate of freehold* in the *ancestor*, the rule applies; and this seems to be a position so clear, that every case of this description *necessarily* invites the application of the rule. From these deductions it appears, that the *previous enquiry* must be, what is the true construction of

the limitation to the heirs, or heirs of the body, considered distinct from the freehold in the ancestor.—Does it describe all *possible heirs* of that description, so that it is not confined to *one* or *more* persons in whom the character of heirs shall be first fulfilled ; or does it by these words, independent of words of superadded limitation, extend to the *issue*,—or the *issue* and other relations of these persons, is the material point to be discovered : and the rule in *Shelley's Case* will be applicable or not, according to the result of this enquiry. That *all possible* heirs of the given description are to take in succession, from generation to generation, under the name of *heirs of the ancestor*, is to bring the case immediately within the rule : and that only *one* or more individuals are to take, in that character, or rather as *particular* persons described by that name, either for their *lives* only, or for an estate of *inheritance* to be deduced from them as the *stock* or *ancestor*, and that *their* heirs are described by superadded words of limitation and as *their descendants*, is to exclude the rule.—The intention that the heirs are to take by purchase or not, ought to form no part of the enquiry. The single point to be decided, is in what manner

ner they are to take; *generally*, without exception, as a class of inheritable persons, and as the successive heirs of the person to whom the preceding estate of freehold is limited; or *partially* as *individuals* selected out of the class of heirs, for an estate, which, so far as it depends on the limitation to the heirs, as heirs, &c. of their ancestor will determine with their *deaths*, and so far as it is of an *inheritable* quality; will intitle those heirs *only*, who, deducing their pedigree from these *individuals*, are to look up to them as their common stock, from whom their descent is to be derived, the same as if the ancestor of these individuals, had not been named.

It is upon these grounds that the decision of *Perrin and Blake* (s) in the *Exchequer Chamber* is more satisfactory than the one pronounced in the Court of *King's Bench*.

In that case the devise, so far as it is material, was made by Mr. Williams in these words;
"Should my wife be ensient with child, at any

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" time

(s) 4 Burr. 2579. 1 Black. Rep. 672. 1 Collectanea Juridica.

"time hereafter, and it be a female, I give and
 bequeath unto her the sum of £2000, &c.
 "And if it be a *male*, I give and bequeath my
 "estate real and personal equally to be divided
 "between the said infant, and my son *John Wil-*
 "*liams*, when the said infant shall attain the age
 "of twenty-one. *Item* it is my intent and mean-
 "ing that *none of my children shall sell or dispose*
 "*of my estate for longer time than his life; and to*
 "*that intent* I give, devise, and bequeath all the
 "rest and residue of my estate to my son *John*
 "*Williams* and the said infant for and during
 "*the term of their natural lives*: the remainder to
 "my brother-in law *J. G.* and his heirs for and
 "during the lives of my son *John Williams* and
 "the said infant, the remainder to *the heirs of*
 "*the body of my said son John Williams* and the
 "said infant lawfully begotten or to be begotten,
 "the remainder to my *daughters, &c.*"

It is by observing on this case, that the rule
 may be brought to the test, and illustrated. That
 this case did or did not call for the application of
 the rule, was a point, on which a great diversity
 of opinion was entertained. Men of the first
 eminence differed in their sentiments on the con-
 struction

struction of this will.—In the *Exchequer Chamber* it was held by a majority of the judges, that the rule did apply to this case; and the judgment of the Court of King's Bench, pronounced upon the opinions of Lord *Mansfield* and Justices *Willes* and *Aston*, against the opinion of Justice *Yates* who argued very ably and strenuously for the application of the rule, was reversed.

Now, trying the solution of the law on this will, by the modes of enquiry that have been recommended for ascertaining the application of the rule in doubtful cases, it is clear that the case of *Perrin and Blake* was completely within the *reason* and the *terms* of the rule—without any circumstance, besides the intention of the testator, (collected from the express estate for life, and the limitation to support contingent remainders) that the heirs should take *distinctly* from their ancestor, to shew that the testator did not use these words as words of *limitation*, that is, as comprehending the *whole class* of heirs; and this intention, so far from negating the application of the rule, is the very reason from which it had its origin. It was clear that the testator intended that the *successive*

heirs of his *son*, and not merely *one* or *more* individuals in particular, should be intitled under the limitation to the heirs of his body. He might have intended, and most probably he did mean, that the *first* and other *sons* should take *successively* in their *own right*, apart from their ancestor, an estate transmissible from them to their heirs in tail. But to the words he used, in the general and unqualified manner in which they were introduced, the law has appropriated no such meaning, and therefore. it could not affix to them any such sense, The words heirs of the body unexplained by any *adjunct* or *declaration* (t) will not in a Court of law admit of this interpretation; and even in a case (u) in which words pointing to a *succession* of the heirs according to *seniority*, and by way of *remainder*, and others of a corresponding and still stronger import were used, it was determined that they were not sufficient to turn the word heirs, &c. into words of purchase, descriptive of the *first* and other *sons*, as *distinct* persons, unconnected with, and independent of their character of *heirs*.

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(t) See *Hodgson* and *Ambrose*. *supra*.

(u) *Legate v. Serwell*. 1 P. W. 87. 1 Eq. Abr. 394.

In *Perrin* and *Blake* to have given each respective son, according to his seniority, an estate tail, so that each several son might have a vested estate at the same time, one *in possession* the others in *remainder*, would have been to annex to the words heirs of the body, a sense of which they do not admit in a Court of Law. No Court regulating its decisions by the strict rules of the *Common Law*, has ever yet gone so far as to put such a liberal construction on these words, standing alone and undefined, as to determine that they shall give *several* and *distinct* estates to *distinct* persons, when these persons all come under the same denomination, and are described by a *general* term as a *collective class* of persons. The cases of *Mandeville* (v), and *Wills* and *Palmer* (w) go the length to negative this construction, by shewing that the law will give all the estate or degree of interest imported by these words, to the first taker, even in those instances in which the heirs are *unquestionably* to be intitled as *purchasers* by that name of designation, and that name embraces other persons who may successively answer the descriptive terms of the limitation to the heirs; and to have determined that

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(v) 1 Inst. 26 b.

(w) 5 Burr. 2615. 2 Black. Rep. 687.

any individual, or the person in whom the character of heir should be first fulfilled, would take exclusively of all the other persons who might answer the description, and that the gift should be confined to that person and his heirs of his body, would have been to abridge the gift, to the prejudice of other persons who were clearly and equally the objects of the limitation. For these reasons it seems agreeable to first principles and every rule of construction, to conclude that the heirs were intended to take as a *class* or *denomination* of persons, and not as *individuals* particularly selected out of that class or *denomination*; and since under the will which gave rise to the question in *Perrin* and *Blake*, they were to take in this manner, and their ancestor had a preceding estate of freehold, there was no well founded reason to contend that this estate did not attract to him the benefit of the limitation to his heirs.

'Tis true that in the construction of *articles* for a *marriage* settlement, the Court of *Chancery* exercising its *equitable jurisdiction* to correct the manifest *errors* of the parties, does, in some cases, construe a limitation to the heirs of the body to give an equitable interest in tail to the *first* and
other

other sons. But this practice furnishes no argument for a similar construction of these words in a Court of law. The Court of *Chancery* itself allows that the *legal* and *proper* construction of these words, is that which results from the conclusions to be drawn from the rule in *Shelley's Case*; and even admits the necessity of changing the words, in order to give the intention that effect *at law*, which is agreeable to its own *equitable interpretation* or rather *interference*.

It will be material also to observe that, generally speaking, the doctrine is equally applicable to limitations of the *legal estate*—limitations of *use*,—and limitations of *trust*: and extends as well to *copyhold* as to *freehold* lands and tenements.

It will be right also to premise that in those cases in which the owner of an estate, either *freehold* or *copyhold*, limits the ultimate interest, (being the fee) to his *right heirs*, by way of *use*; in the case of *freehold* lands, either upon a *conveyance* or declaration of uses (x); and in the case of
copyhold

(x) *Fenwick and Mitford* Mo. 284. 1 Leon. 82. 1 Inst. 22 b. 1 Co. 100. *Reade and Morpeth* Cro. Eliz. 321. Sir T. *Tippen's Case*. 1 P.W. 359. *Earl of Bedford's Case*, Mo. 718. Poph. 3.

copyhold lands upon a surrender to uses (y), he has the *fee*, as his *old reversion*; and as to this point so far as relates to *freehold lands*, it makes no difference, whether an estate of freehold is limited to *his use*, or an estate of freehold is limited to the use of any other person, expressly for the exact period of his life, or he has an estate *for years* by express limitation. A limitation to the use of his *heirs of his body*, is not affected by these observations; for unless the author of the uses, takes a preceding estate of freehold by limitation, or resulting use, his heirs of this description, will, under a limitation to them, take by *purchase* (z); and if the ancestor takes a preceding estate of freehold, the rule which is the subject of this essay, applies to the several limitations, and his heirs of his body cannot be intitled, otherwise than by descent from him.

Since a man cannot devise an estate to himself, no limitation in *his will* to his *heirs* or *heirs of his body*, can become the subject of the rule, for want of an estate of freehold in the ancestor; and
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(y) *Roe v. Griffiths* 4 Burr. 1952. Thrustout ex dem *Gower v. Cunningham*, Fearne 90. 2 Black. Rep. 1046.

(z) *Eise v. Osborne*. 1 P. W. 387.

in deeds operating *solely* by conveyance at common law, a man cannot, with effect, limit any estate to himself, or to his *heirs*, or *heirs* of his body *as such*, and under *that* appellation.

In wills, a devise by a man to *his heirs of his body*, will create an intail, in favor of those persons who are within the descriptive terms of the devise, as *purchasers (a)*, in the manner already noticed, and as will appear in the essay on estates, under the chapter which treats of estates tail; and a devise by a man to his *right heirs*, by that name, with an intention that they shall have the fee, is *void*; and they will have the reversion by descent, as his heirs, without any regard to the rule professedly treated of in this essay.

To the generality of the position, that a man cannot make himself, or his heirs by that name, *purchasers*, by a limitation in a conveyance at the common law, the validity and effect of a limitation to him, in a fine *sur grant & render*, has the semblance of an exception. It must be allowed, that the *render* of a fine of this sort, may give an estate to the granting party, or to his heirs

(a) *Wills v. Palmer.*

heirs as purchasers by that name, and that, in point of fact, the fine, collectively considered, is the conveyance of the person, who gives effect to the grant in that fine. In legal intendment however, the person who makes the *render* is considered as the author of the *estates* limited back to the original owner, or to other persons. The instrument is considered as a *double conveyance*, as a *grant* and *reconveyance* made by several, and distinct instruments; and therefore this case is neither within the terms or the scope of these observations. It was thought proper to notice this case, that no confusion might arise, from the impression which it might have made, before it had been sufficiently weighed, and the reason that occasions the difference had been considered.

And it is also to be observed, that when the word heirs, connected with an estate of freehold in the ancestor, is used in deeds or wills, to describe a class or *denomination* of persons, and under the rule now in discussion that limitation might have given the interest to the ancestor, this limitation will fail of effect, unless, at the testator's death, the ancestor is living to take the interest; and the heirs can not take by *purchase* though
their

their ancestor never was in a situation to have the freehold, and though they would have been intitled as *purchasers*, if their *ancestor* had not been named to take the previous estate (b).

And it is also to be understood, that there are some cases, falling under the *literal terms* of the rule, that are not within its extent and application. These cases will be noticed, in the sequel of these observations, as forming exceptions to the rule. They comprehend those limitations in *deeds, wills*, and other *writings* in which the words "Heirs or heirs &c." are used and *explained*, in a sense that makes them words of purchase, and of the same import ; in some instances as the *first* and other *sons*, &c. or a *particular son* of the ancestor, and *his* or their heirs of his or their bodies ; and in other instances, as *all the children* of the ancestor, and the heirs of the bodies of these children, in lineal *succession* from *them*, according to the rules of descent ; and in other instances, as a particular *person*, distinguished at present, by a title or description that he, of all others, is most likely to answer and fulfill at a future period.—They also comprehend those limitations in *marriage articles* in which, from the nature of the provision

(b) *Hodgson v. Ambrose.*

provision, the parties must have meant that the *first* and *other sons*, &c. should take by *purchase*, or they have entered into an agreement, which, *so far as relates to the heirs*, can give no certain advantage to them.

And it must also be understood, that the word *issue*, used in wills in the same sense and as a substituted term for heirs of the body, is within the scope and extent of the rule.—As to those cases in which it has been held in the construction of *wills*, that an estate of inheritance has passed under limitations to *sons*, or *children*, in these terms, when the ancestor takes a preceding estate of freehold, they are to be referred, some to the *third*, others to the *fourth* rule proposed for the interpretation of wills, under that chapter in the essay on estates, which treats of estates tail. These rules are expressed with a trifling variation in the language, which is noticed by *italics* and the omission of the marks of quotation, in the following words (c),

“When it appears to be the intention of a
 “testator, that all the issue of a person to whom
 “a devise is made, are to take under his will,
 “and they cannot *all* take, unless an estate tail
 “passes to the ancestor, the ancestor shall have
 “an

“ an estate tail, that his issue may take in succession from him ; and a devise to him for life by express words, will not prevent this construction.

“ When there is a manifest intention on the part of a testator, in favor of the issue of a devisee generally, or some of them in particular ; and there is also a *particular* intention, according to which the issue are to take in a manner different from that in which they can have the land if they are to claim in succession from their ancestor, the will shall be construed according to the *general* intention, and not be confined to the *particular* one, and the devisee shall have an estate tail.”

It is the *estate of freehold*, which, with the exceptions that have been noticed, and are to be observed on in the sequel, *attracts* to the ancestor, the *estate* imported by the *limitation to his heirs*. The rule is, by some thought to be of feodal origin (*d*), or to be accounted for only upon the principles of that system of tenures, and the consequential fruits of seignory. This

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(*d*) 4 Bac. Abr. 301.

was the opinion of Justices *Aston*, *Willes*, and *Yates*, delivered in *Perrin and Blake* (e): the first of whom said, "The maxim itself grew with "feodal policy;" the second that "It was an old "rule of feodal policy; and the third that "The "rule had its origin in feodal policy, and grew up "in days when the law favored *descents* as much "as *possible*."—After the time that *wardships*, *reliefs*, and other incidents of tenure, flowing from hereditary estates, were introduced into this system of property, it was accounted a fraud upon the Lord, who was intitled to these fruits and incidents upon the death of his tenant, and the succession of the heir, that there should be a power to give the estate to the ancestor for his life only, and of extending that estate to his *heirs*, *quatenus* they were his heirs: so that the heirs should be intitled precisely in the same manner, as if they took by hereditary succession, and at the same time, take as *purchasers* in their own right, and, as a consequence, defeat the Lord of the fruits that he would be intitled to have, upon a succession from the ancestor. On this account, and with great reason, this rule is supposed to have been framed, to give the estate to the ancestor, that
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(e) *Collectanea Juridica*, 298. 305. 312.

the heirs might take by hereditary succession, in a course of descent, and the Lord have the fruits of his feignory; and in truth, the statute (*f*) enacted for annulling feoffments, made *fraudulently*, to those who *must* be the heirs of the feoffor, to defeat the Lord of his wardship, is a *legislative* provision, levelled against the same sort of injury. For in these days, wardship was the most valuable fruit arising to the Lord from his feignory:—and the *King* in particular was very much concerned to prevent all unfair means of depriving Lords of this incident of tenure, and they could be deprived *only* by the tenants introducing the *heir* to the *Lord* as a *purchaser*, instead of suffering him to be intitled by *descent*. The statute which has been mentioned, provided against the practice of conveyances by fathers to their *eldest sons*; and, probably, to elude the statute in that particular case; and in other cases, as between persons becoming purchasers and their *heirs*; feoffments and conveyances were made, under which the father or purchaser would take an estate for life, with a *remainder* to his *heirs*: and the Courts of Justice, perceiving the frauds committed against Lords by this prac-

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tice,

(f) 52. H. 3. c. 6.

tice, which, if indulged, would have totally deprived them of their right to *wardship*, put that construction upon the *several limitations* which they receive at this day. For it is evident from the statute which has been mentioned, that tenants made a general practice of devising means to deprive the Lord of his wardship, and that the legislature was anxious to afford relief to the Lord; and it may, therefore, very fairly be concluded, that one of the means, devised for the purpose of defrauding the Lord, was to make the conveyance to the ancestor and his heirs, by several limitations, with an intent that the heirs should be *purchasers*, and that the Courts of Justice, acting upon the spirit of this statute, or perhaps upon some ordinance which then had the force of law, applied to the several limitations that construction, under which it is, at this day, held that the limitation to the *heirs* gives the inheritance to the ancestor. At least without such construction the provisions of this statute might have been easily eluded.

Others, (g) on the contrary, have been of opinion, that the rule owes its existence to the relation

(g) Mo. 720. Fearne 113. cites Ch. Baron Gilbert's M. S. S.

relation between the *beir* and the *ancestor*, and the genuine construction of the law, which, they contend, holds a limitation to a man and his *heirs*, or *heirs of his body*, by *several* and *distinct* clauses, and even with a division of the time or interest, to pass by these limitations, to be of the same nature, import and extent, as a limitation to a man and his heirs, or heirs of his body, by one connected clause of limitation; with the difference only, that when the limitations are several and distinct, and estates are substituted intermediately, the intermediate estates must have priority, according to the order of their limitation. Thus Chief Baron Gilbert (*b*), in accounting for the cases falling under the rule, among other conjectures, refers "their principle "to the conformity or parity of reason" that several limitations,—one to the ancestor,—the other to his heirs,—"bear to a limitation to A. "and his heirs—or heirs *male* or *female* of his "body;" and reasons thus, "as the one gives "an estate for *life* by implication *and more*, so "the other gives the *same* in express words *and "more*; and *expressio eorum quæ tacite insunt "nihil operatur*. And the interposition of ano-

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(*b*) Fearne 14.

“ther estate between them, only breaks the *order*
 “of the limitation, not the *operation* of the
 “words : which being the same in both cases
 “ought to have the same operation and con-
 “struction.”

To this effect also are the observations of
 Mr. *Fearne* (*i*) who says, in one passage, “In
 “truth the only substantial difference, between
 “a limitation to A. and his heirs ; and a limi-
 “tation to him for life, remainder to B. in
 “tail, remainder to the *right heirs* of A ; ap-
 “pears to be, that in the first instance, A. takes
 “the *entire estate* in fee, and, in the other case, he
 “takes it *divided* by, and *subject to the estate tail*
 “in B. The words *his heirs*, in either case,
 “operate equally as words of *limitation*, viz.
 “words giving the estate imported by them, *not*
 “originally to the *express objects of the description*,
 “but extending the ancestors estate, *immediately*
 “in the one case, and *mediately* in the other, to
 “them by *descent*, and limiting the ultimate
 “bounds of the estate which he is to take.”—
 “And in another passage (*k*), “If we consider
 “the freehold, what in truth it is, a portion of
 the

(*i*) Page 106.

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(*k*) Page 309.

“ the inheritance, the rule says no more than that
 “ you shall not apportion and divide the inheri-
 “ tance between the ancestor and a line of suc-
 “ cessors, claiming under a denomination belong-
 “ ing to them only as his representatives, to an
 “ inheritable estate, derived from, or under
 “ him.”—But, with great submission, these ob-
 servations are conclusions, resulting rather from
 the *determinations* on the rule, than from any
 general interpretation of the law. They are the *effect* of the rule, and not the construction of the
 cases.—In a general point of view, the cases do
 not require *this interpretation*, but the rule
 adapted to these *particular* cases determines that
 they shall receive it. 2

Since the distinction between estates for life and
 in fee was already marked, and it was a settled
 point that the owner of a fee might, at least with
 the consent of his Lord, dispose of his estate to
 the exclusion of his heirs not being his *issue in*
tail, it is highly improbable that the fee would
 have been conveyed to him by the circuitous

terms of several limitations, one to him for his *natural life*—the other *after his decease*, to his heirs —These expressions tend strongly to discover an intention that the ancestor shall have no greater interest than for his life, and that, after his decease, his heirs shall be intitled in their own right; and if such is the apparent intention, what rule of *construction* denies effect to the same? To defeat that intention, it was necessary to introduce a *negative* rule; a rule, which for some reason of policy, should contravene this intention: and of this description may the rule in *Shelley's Case* be very properly considered.

And by way of caution to the conveyancer, it will not be superfluous to observe, since the practice does not appear to have been ever adopted, that a certain way to avoid any question on the rule, indeed to preclude all doubt, when he *intentionally* uses the word heirs as a word of limitation, is to make the limitation to the *person* and his *heirs*, or heirs of his body, even though there is a previous *limitation* to the ancestor of an estate

estate of freehold. In this mode of limitation there is no absurdity at law, though there may be an apparent incongruity in terms ; for there cannot be any impropriety in making the second limitation, as well as the first, to the *person* himself, since the law concludes that a man, who has an estate for life, or an estate tail, may also have another remote interest, for example the fee ; or an estate tail, when he takes only an estate for life under the former limitation ; or a more *enlarged* estate tail, in those instances that he takes a previous and *special* estate of that denomination. To introduce the word *beirs* into any instrument as a word of *purchase*, is always improper, because that word has an *equivocal*, and, used in this manner, only a *constructive* meaning. There are words of definite meaning, that leave no room for the aid of rules of construction, and that ascertain the objects of description so precisely, that no question can be raised on the intention they are to express. Hence the advantage of an intimate acquaintance with the law of assurances, and the *legal import* of words, since an extensive knowledge of the law on this subject enables the practitioner to defy either the sophistry, of argument, or the

power that leaves Courts of Justice at liberty to decide on doubtful questions, in their discretion, which, though exercised with a well meant regard to the intention of the parties, often defeats that intention. In short, the art of the conveyancer is properly exercised, and his skill and knowledge, as well as his caution and regard to the interest of his employer, most judiciously displayed by the use, in those instances in which it is in his power to introduce them, of words and phrases of a fixed and acknowledged import; and, in those instances, in which words of this description cannot be found, by adding such explanatory declarations as clearly express the intention, and consequently, leave no room for *discretionary* construction.

Leaving it to the diligence of the student to satisfy himself of the policy that in the first place gave rise to, or called for, the adoption of the rule, it may be assumed, as a certain and incontrovertible position, warranted, in its fullest extent, by practical observation, that the object of the rule, is to give to the ancestor, *taking an estate of freehold*, the interest imported by the limitation to his heirs, so as to confer on him the ownership of

of that estate, and make it descendible *from him* to *his* heirs, in the regular line of succession; precisely in the same manner as if the limitation to *his* heirs, was to *him* and *his* heirs, &c. and since this is the implied construction of the law upon the several limitations, it must be allowed that there will be no impropriety, much less any absurdity, in following the advice that has been offered, to give the estate, by the second clause, to the *ancestor* and his *heirs* of his body, instead of making the limitation to the heirs of the body, without taking any notice of the ancestor.

That this was the object of the rule, is clear from the cases to which it is applied at this day, and 'tis from its application alone, that any conclusions can now be drawn to the reason of the rule. The reports of the old cases are silent on the reason of the rule, and leave it to conjecture to discover them; and till the Case of *Shelley* received its decision, very few cases had invited, or at least involved, a discussion of the rule; and when that case first arose, the rule does not appear to have been understood or acknowledged as a general and universal position, perfectly settled and received as an *axiom*.

The

The opinions advanced by the gentlemen who argued that case, and who were of the most distinguished abilities, and, afterwards, filled the first seats of Judicature in different departments, make this pretty evident. The cases cited in Lord Coke's report, as those by which the rule was proved, are all taken from the *year books* in the time of *Edward the Third*. Of these cases, that of the *Provost of Beverly* (1), which was before the Court in the fortieth year of that reign, is the most modern. It arose upon a fine *sur grant & render*, by which lands were settled upon John Sutton the granting party in the fine, for his life, remainder, after his death, to John his son, and to Eline his wife, and the heirs of their bodies begotten; and, for default of such issue, remainder to the right *heirs* of John the father: John the father and John the son were dead, and Eline was also dead, and there were no issue of herself and John her husband. Richard, another son of John the father, entered, claiming as a *purchaser* under the limitation to the *right heirs* of his *father*. The effect of this limitation came in question, upon a distress for a relief, a replevin, and conuzance by the bailiff of
the

(1) 40 Edw. 3. 9.

the provost of Beverley, setting forth the limitations, and justifying upon the ground that a relief was payable. The plaintiff in replevin concluded to the Court, demanding their judgment, if the avowry for the relief could be supported. The arguments on the part of the plaintiff, as well as some cases cited in support of these arguments, were directed to shew, that the limitation to the *heirs* gave the estate to Richard by *purchase*. The Counsel for the avowant argued that Richard became intitled by *descent* from his father. Whether *Candish* and *Thorpe* were on the bench, or of Counsel with the avowant, is not clear. The former said, "If the lease
" had been to the father for *life*, the remainder
" to his *right heirs*, the father would have had
" the fee," and concluded that because "the lease
" was to the father for his life, the remainder to
" John his son in tail, the remainder to the right
" heirs of the father, if Richard" (the second son) "had been then *under age*, the Lord should
" have had the *wardship*, and, by consequence,
" he should have relief." He added "If a writ
" of right had been brought against John" (who was tenant in tail) "after the death of his father,
" he might have joined the *mise* in his own right,
" and

“and in no other right,” and this he said “proved
“that he had the fee simple.”

Thorpe, in answer to *Finchden*, of Counsel with the Plaintiff in replevin, observed, “that the
“objection was to pay a relief, because Richard
“became intitled as a purchaser, in regard that
“he was the first person in whom the remainder
“could take effect by the words of the remainder,
“but” continued he “your title is as *beir* to your
“father, and your father had the *freehold preced-*
“*ing*, and if John his son and Eline his wife had
“died”—(without issue it must be intended)
“in his life time, he would have been tenant in
“fee simple, and, for this estate, might have
“brought a writ of right, and the remainder was
“not at all limited to *you* by your *proper name*,
“but as *beir*,” and, for *these reasons*, it was
awarded by all the Justices that a return should
be made, consequently that Richard took by
descent, and a relief was payable.

Of all the cases particularized in the report, this alone is intelligible; and it is the only one from which any conclusion to the rule under consideration can be drawn. This case however is so clear and precise to the point, that it leaves no
doubt

doubt on the decision, and it is material that one of the express grounds of the adjudication, was that the ancestor had a *freehold preceding*.

There are some cases of an earlier date, and a few subsequent to this decision and prior to *Shelley's Case*, all enforcing the same rule (*m*). The most early case in our books was determined in M. 18. Ed. II. (*n*), and one of the reasons assigned by the Court, for construing the heirs to have taken by descent, was that otherwise the *fee* and the *right* would, after the determination of prior estates of inheritance in tail, *have been in nobody*. A circumstance which is very remarkable, is that none of these cases take any notice of the policy that induced the Courts to put this construction upon several limitations to the ancestor and his heirs; and Mr. Justice *Blackstone* (*o*) in delivering his opinion upon *Perrin* and *Blake*, while before the Court of Exchequer, upon a writ of error, held it by no means clear "That this rule took its rise, merely from *feodal* principles; "he was rather inclined to believe it was first established

(*m*) F. N. B. 196 H. 5 Edw. 4. 2. 11. H. 4. p. 227. b.

(*n*) Mayn. Edw. 2. fo. 577.

(*o*) Harg. Law Tracts 1 vol. 498. 500.

“ established to prevent the inheritance from be-
 “ ing in *abeyance*, and that one principal founda-
 “ tion of it was to obviate the mischief, of too
 “ frequently putting the inheritance in suspense,
 “ or *abeyance*. Another foundation,” he said,
 “ might be, and was probably laid in a princi-
 “ ple diametrically opposite to the genius of the
 “ feudal institutions; namely a desire to facili-
 “ tate the alienation of land, and to throw it
 “ into the track of commerce, one generation
 “ sooner, by vesting the inheritance in the ances-
 “ tor, than if he continued tenant for life, and
 “ the heir was declared a purchaser.”

Against the first branch of this hypothesis, it
 may be fairly alledged, that it proves nothing, or
 proves the very point which is insisted on, For,
 as between whom except the *Lord* and *tenant*, or
 how as between them unless it was in regard to
 the fruits of the seignory, could there have arisen
 any difference whether the inheritance was vested
 or in *abeyance*. The doctrine of the law, re-
 quiring that contingent estates of freehold shall
 be supported by preceding particular estates of
 the same quality, and that such contingent estates
 of freehold shall be void in event, unless they
 become

become vested in interest before the determination of *all* the particular estates of freehold by which they are preceded, and in relation to which they are remainders, had abundantly provided for the inconveniencies that might otherwise have arisen to *strangers*, or, in any other respect than so far as relates to the fruits of feignory, even to the *Lords* themselves : and there is no trace from which it can be fairly inferred, that a wish to facilitate the powers of *voluntary* alienation, in the then generation, could, at this early period, in any degree, have influenced the decisions of the Courts of Justice. The provisions of the statute *de donis* made about this time (*p*); the low, though improving state of commerce; and the fettered terms imposed upon estates, are strong arguments to be urged against the second branch of the hypothesis.—Besides, to account for the rule, by this branch of the hypothesis, is to assign a cause by no means equal to, if at all corresponding with the effect, especially in the application of the rule to limitations to *heirs* of the body; since it was not till the reign of the *fourth Edward* that an estate *tail* conferred the power of aliening the inheritance; and, even in this advanced

(*p*) The reign of the *first Edward*.

vanced period of estates tail, the alienation was made under a mode of assurance invented for the very purpose of evading, through the medium of a fiction, the express provisions of the statute of intails, commonly cited under the name of the statute *de donis*.

To return to the consideration of the circumstances that call the rule into operative force. That the rule may apply, the ancestor must take a *preceding* estate of *freehold*, either *by limitation*, *by resulting use* (q), or *implication of law* (r), and must take that estate by, under, or as consequence of, the *same* deed or instrument that contains the limitation to his heirs; for in those instances that the estate limited to the ancestor, is *for years only*, and he takes no estate of freehold (s), or an estate of freehold is limited to him by one deed or instrument, and the limitation to his heirs is by *another* deed or instrument (t), (with-
out

(q) *Pybus and Mitford* 1 Vent. 372. *Wills and Palmer*, supra.

(r) *Hayes and Ford* 2 Black. Rep. 64.

(s) *Tippins Ca.* 1 P. W. 359. *Harris and Barnes*, 4 Burr. 2157. 1 Inst. 319. b.

(t) *Moor and Parker*. L. Raym. 37. *Fonereau v. Fonereau* Doug. Rep. 470. *Snow and Cutler*. 1 Lev. 135.

out any regard to the priority of the instruments to which one, or the other of the limitations owes its existence, and under which it is to receive effect) the rule has no application; unless the limitation to the heirs is in a deed of appointment to uses, taking effect under a power, inserted in the same deed, that contains the limitation of the estate of freehold to the ancestor; and in that case, it seems to be doubtful, whether the several limitations will unite and consolidate, so as to give the ancestor the interest imported by that limitation or not (*u*). The inclination of the opinion of those, who seem best versed in this learning, is, that the several limitations will consolidate. To this opinion, there are some objections. The strongest, and one which does not appear to have been yet suggested, is that an interest, *once determined to be an estate for life*, without any reference to or connection with the *inheritance* in the tenant of that estate, will, by subsequent matter, and, in some cases, by the act of a third person, become an estate of inheritance. Another objection is, that the heirs cannot, in reference to the estate of their ancestor, take by way of remainder. And, in the opinion of Mr.

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Fearne

(*u*) Fearne 99. Butler on 1 Inst. 229. b. n. 1.

Fearne (v), the rule has no application, in those instances in which the ancestor has the freehold merely as a *trustee*; taking no *beneficial interest* in that estate. This position seems equally questionable. It proceeds upon a supposition, that the ancestor has the beneficial interest of the limitation to his *heirs*, merely in respect of, and because he takes a beneficial interest under, the limitation to himself; and assumes it as a settled point, that the law recognizes the trust of the estate of freehold limited to the ancestor; while resorting to the first principles of Law, and the spirit of the rule, the declaration of trust, annexed to the limitation of the freehold to the ancestor, does not appear to make any difference. It is not clear that the law can take any notice of this equitable interest; and if it recognizes that interest, still, in any point of view, the two limitations are equally the objects of the rule.

They involve every reason that made it necessary to frame the same, for if this case had happened while wardship and other fruits of feignory were the consequences of the tenure, it would have been equally as injurious to the

Lord

(v) Page 39.



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Lord that the *tenant* should take by purchase, as if the ancestor had received the freehold, discharged of the trust. And to allow that the rule does not extend to a case with these circumstances, is to depart from the terms of the rule, and the spirit of the same, so far as that spirit can now be collected.

Nor is the Case of *Moor and Parker* (w) (the leading authority for the position that the several limitations to the ancestor and his heirs, must be contained in, or *mediately* or *immediately*, owe their effect to the same instrument) over-ruled by the determination of *Hayes and Ford* (x); a case which arose on a devise by a man to his brother N's sons, after, and in remainder of, a limitation to his brother W. and his heirs males; in which the testator, by a *schedule* annexed to his *will*, and *referring thereto*, and, by a special verdict, found to be *part thereof*, and purporting to be an account of the manner in which he had thereby disposed of his property, said "And for want of his brother W's having " sons, then to his brother N's sons, and for want

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" of

(w) *Supra.*

(x) *Supra.*

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“ of sons, then over ;” and on an appeal from the Court of K. B. in *Ireland*, where it was held, that none of the sons of N. took only an estate for life, to the Court of K. B. in *England*, it was determined that this son took an estate tail ; for this determination was pronounced, expressly, upon the ground that by the will, as explained by the schedule, the son took an estate for life by *implication*, and that estate attracted to him the benefit of the limitation to his heirs males : so that the Court assumed it to be a *fact*, that the *will* and *schedule* were in legal intendment, *several parts* of the SAME instrument, and that the words of one paper, might be called in aid of the construction, and in order to the exposition, of the words in the other paper.

So as the preceding estate is of freehold, it is immaterial, whether the same is for *life* or in *tail*, or for the life of the *party*, or the life of any other person, or for the *joint* or *several* lives of the party and some other person ; or is *absolute*, as for *life certainly* ; or has a collateral determination as *during widowhood* ; or, as hath been already noticed, arises by *express* limitation, *implication* of law, or *resulting use* : and though the estate is determinable

determinable on an event which may happen in the life time of the ancestor (y); as to A. and B. for the *life of C.* remainder to the *right heirs* of A. or to a woman during her *widowhood* (z), remainder, after her decease, to her heirs of her body; so that the particular estate of freehold limited to the ancestor, may determine in his life time, in the first instance by the death of C. and in the second instance by the previous death or marriage of the widow, and consequently, with a view to both these cases, before there can be any one to fulfil the character of heirs, in relation to the tenant of the estate of freehold: *or* the ancestor may, *or may not be living* at the time, that the limitation to the heirs, is, by the words introducing that limitation, to take place (a); as to two persons who are not husband and wife, during their *joint* lives, and, after the decease of *either of them*, to the heirs of the body of the wife begotten by the husband; so that the wife may die in the life time of her husband, or survive him, and, if she survives him, her estate of freehold will have determined in her life time: *or* the

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ancestor

(y) Fearne 33. Perk. § 337.

(z) Merrel and Rumsey, *infra*.

(a) Merrel and Rumsey 1 Keb. 188. Raym. 126. Siderf. 447. 4 Bac. Abr. 301.

ancestor *must die*, before the object of the limitation to the heirs can be ascertained, or, in other words, before it is certain, that he, in *particular*, is the person to whose heirs the limitation is made (*b*); as to A. and B. so long as they *jointly* together live, remainder to the right heirs of him *that dieth first*; so that the object of that limitation cannot be ascertained till the death of one of the tenants for life, and as it is to the heirs of the person who shall *first die* that the second limitation is made, that limitation cannot, by any possibility, give him a vested interest in his life time; still the rule applies; and the limitation to the heirs will give to the ancestor the benefit imported by that limitation. The several examples introduced to illustrate the second and third propositions, also, in some degree, illustrate the first. The third goes somewhat further, furnishing the circumstance that the ancestor's estate of freehold must *necessarily* determine before the limitation to his heirs can give a vested interest. On these examples also one observation more may be made: they all, except the last, immediately from the first instant, give *vested interests*, and consequently estates either in possession or in remainder,

(*b*) Fearne 32. 33. 1 Inst. 378.

remainder, to the ancestor. The last example gives a contingent interest to the ancestor.

These positions will demonstrate, with sufficient accuracy, of what nature the estate of freehold must be, which, connected with a limitation to the heirs of the person who takes that estate, will attract to him the benefit of that limitation. They are all the examples afforded by cases expressly determined on the point, and the principle of these determinations, in the terms they are stated, seems to supply authorities for every possible case that can be proposed in reference to the natures and qualities of the ancestor's estate of freehold.

For, accordinging to one of our most celebrated law writers (c) (and under this *appellation* the name of Mr. *Fearne* will naturally occur) it may be considered as a general rule " That
" whensoever the ancestor takes any estate of
" freehold, whether it be, or be not, such as may
" determine in his life time, and there is after-
" wards, in the same conveyance, an *unconditional*
" limitation to his right heirs, or heirs in tail,

E 4

either

(b) *Fearne* 37.

“ (either immediately, and without the interven-
“ tion of any mesne estate of freehold, between
“ his freehold and the subsequent limitation to
“ his heirs ; or mediately, that is with the inter-
“ position of some such mesne estate) there such
“ subsequent limitation to the heirs, or heirs in
“ tail, vests immediately in the ancestor, and
“ does not remain in contingency or abeyance ;
“ with the distinction that where such sub-
“ sequent limitation is immediate, it then be-
“ comes executed in the ancestor, forming, by
“ its union with his particular freehold, one
“ estate of inheritance in possession ; but where
“ such limitation is mediate, it is then a remain-
“ der vested in the ancestor, who takes the free-
“ hold, not to be executed in possession, till the
“ determination of the preceding mesne estates.”
To the observation that the limitation to the
heirs must be *unconditional*, and this, indeed, is
a conclusion from the same principle, and per-
haps (in general understanding, though not in
strict in technical propriety) within the scope of
the same term, it must be added that this limi-
tation must be to the heirs of some *certain* per-
son, as of A. B. and not leave the ancestor whose
heirs are the designed objects of the limita-
tion

tion unascertained ; as to the heirs of the *survivor* of several persons ; or to the heirs of *such one* of several persons as *shall first die*.—On this point some observations have been already made, and others will be subjoined.

And it is necessary to remark that though the limitation to the heirs may, originally, give a *contingent* interest, the interest imported by that limitation, may by the rise of the event, or the lapse of the time, that makes the estate contingent *vest* in the ancestor ; and though the estate does not vest in the ancestor, and though it cannot by any *possibility* become a vested interest in him, he will have the same as a *contingent* interest, which his heirs, if they ever become intitled, must derive from him by descent. And this interest will confer on its owner the power of *testimentary* alienation ;—the *right* of *releasing*, &c. The positions that have been advanced, will have led to the opinion, that the *quality* of the estate to pass by the limitation to the *heirs*, with regard to its being vested or contingent, cannot, in any case, depend merely on the nature or quality of the ancestor's estate of freehold.

*See acc.
is. Litt.
37 P. 6.
But yet
quere &
see Litt.
Rep. 25 P.*

It must depend on some circumstance or event independant of the determination of that estate ; making it necessary that some act shall be done, time elapse, or event take place, which is so far *unconnected* with the determination of the ancestor's estate, that it *may not* happen during the continuance of that estate ; nor in the instant in which it shall determine. All these observations take the application of the rule to be granted, and proceed upon a supposition of its application ; and in those instances also to which the rule does *not* apply, the limitation to the heirs, will, according to the circumstance that their ancestor is living or dead, give a *vested* or *contingent* interest to the persons who are the *immediate objects*, described by the terms of the limitation.

Also, though the estate of freehold is limited to *two* or more persons *jointly*, or as *tenants in common*, the rule is admissible, whether under such circumstances, the limitation to the heirs, will give a joint interest, or several and distinct interests to the ancestors, or to one of them singly, will depend on the terms of the limitation to the heirs, as will be noticed in the sequel of these observations.

observations. Also though the freehold is limited to *one* person and the limitation is to the heirs or heirs of the body of that person and *another*, or of that person and *several others*, the ancestor taking the estate of freehold, *may*, under this rule, have the inheritance to the extent of that part which is his share, according to the number of persons to whose heirs the limitation is made. On this point also some further remarks will be made. It must be observed too, in this place, that the several limitations to the ancestor and his heirs must, *both*, give interests of the same nature, either both *legal*, or both *equitable*; and not one a *legal*, and the other a *trust* estate (c); and as has already been noticed, with some doubt on this point, the ancestor must not have the estate of freehold merely as a *trustee*. Of equitable estates, and estates arising from devises in wills, as forming exceptions to the rule, some notice will be taken before the present subject is dismissed.

The limitation to the heirs must be to them *generally*, or *specially*; and the estate will be a fee

(c) Fearne 68. *Jones v. Say and Seale*, 8. Vin. 262. c. 19. *Tippen v. Cofin Carth.* 272. 4 Mod. 380. *Silvester v. Wilson*, 2 Term. Rep. K. B. 444.

fee or fee tail, and a fee, simple, determinable, or qualified, and a fee tail, general or special, according to the extent of the words of limitation to the heirs. These heirs must in *deeds* be described by that, and in *wills* by the same, or some such appropriated or substituted term, and as the *class* or denomination of persons, who are the legal successors of the ancestor, in a regular course of descent, with a view to an estate in fee or fee tail to be derived from him (*d*). These heirs, however, may be named to take, immediately after the death of the ancestor, or after the determination of his estate, though that estate may determine in his *life time*; or after the determination of estates limited in remainder of his estate, and though the ancestor's estate must determine before the limitation to his heirs can give a vested interest; or at a time, that, with reference to the estate limited to the ancestor, without any reference to other estates, may not happen so early as the period at which the ancestor's estate will determine; or the limitation to his heirs may be made to depend for effect on a contingency, or to give a contingent interest from the uncertainty of the person described as their

(*d*) *Jones and Morgan, supra.*

their ancestor. To a limitation to the heirs, to take effect by *springing use*, the rule has no application. This is admitted (*e*), and seems to have great influence in deciding the effect of a limitation to a man in express terms by one deed, and a limitation by another deed or instrument, to his heirs, under a power of appointment contained in the first deed. For what else than a springing use, is a use to arise from power of appointment?

This case of the springing use also seems to prove the position that the limitation to the heirs must be by way of *remainder* (*f*) remotely and in some degree at least, if not immediately expectant on the ancestor's estate of freehold: for upon what other possible ground can an objection be raised against the title of the ancestor under the limitation to his *heirs*? And this is a much stronger case in favour of the rule, than that of several limitations arising from *different* instruments; though the limitation to the heirs is made in pursuance of a power of appointment to uses, contained

(*e*) Fearne 414. *Lloyd v. Carew* Prec. in Chan. 72. Show Par. Ca. 137.

(*f*) Fearne 416.

contained in another deed or instrument that gives the *ancestor* an estate of *freehold*.

It has been proposed that the limitation to the *heirs* must be to them as a *class* of persons and the legal *successors*.—By these positions it must not be understood that the *intention* of the parties necessarily must be that the heirs shall take by descent (*g*). On the line of distinction the necessary observations have been already made.—All that is required, to call the rule into operative force is, that the heirs are described to take in that character, and by that or, in wills, some such substituted *name* (*b*); or, in the more pointed language of Mr. *Fearne* (*i*), “ That the
“ limitation to the heirs, &c. is so calculated
“ and directed, that the person, claiming under
“ it, must intitle himself, merely under the *de-*
“ *scription* of *heirs*, of the species denoted, by
“ by the words in their *technical* sense, and that
“ there is nothing, to restrain the same words,
“ from equally extending to, and comprehending
“ all other persons, successively answering the
“ same

(*g*) Harg. Tracts, 1 Vol. 562. 563.

(*b*) See *supra*. p.

(*i*) On Contingent Remainders, p. 313. and see 1 Harg. Tracts, 563. 575.

“ same description, or from intitling them alike
 “ under it, and by that name only :” nor will it
 be any objection to the application of the rule,
 that it appears to be *probable*, nay even certain,
 that the heirs *as a class of persons*, were intended
 to take originally, in their own right, and that the
 first estate, viz. the estate of freehold, was meant
 to be a mere estate for life, without any further
 interest, present or remote, in the ancestor (k).

In many cases, arising as well on *deeds* as in
wills, this has been the *evident intention*, and yet
 it has not prevailed. In truth the object of the
 rule is to frustrate this intention, as often as the
 word heirs embraces all the persons, *successively*
answering that description, as the class of persons
 described by that term ; for when the author of
 several limitations, one to the ancestor, the other
 to his heirs, or heirs of his body, means that the
 ancestor shall take for his life only, and that
 every other person who, in succession from gene-
 ration to generation, shall be his heir, shall take
 as his heir, and yet that these heirs or some of
 them shall take in their own right, as purchasers
 by that name, independant of their ancestor, he
 then

(k) 1 Brown's, Ch. Ca. 220. *Thong v. Bedford*, *ibid.* 313.

then means what the law will not suffer *him* to give, or the heir to take as a purchaser; for *all* persons claiming under a description or words of designation of *all possible heirs*, must take *as heirs* and not *as purchasers* (*l*). And so in other instances, though a reference has been made to the limitation to the *heirs*, as giving *contingent* interests (*m*) and making it proper to insert a limitation to trustees for supporting these interests, while in fact there were no interests of this quality, unless the limitation to the *heirs* was construed to give the estate to them as purchasers by that name; or words explanatory of the intention of a testator, and restrictive of the powers of alienation which may be exercised by tenant in tail, have been added (*n*); or it has been declared in terms that the heirs were to take by *purchase* (*o*) or *severally* and *successively* by way of *remainder*; the rule has been applied (*p*). Observations to this effect have been already urged;

(*l*) P. Thurlow in *Jones and Morgan*. 1 Brown. Ch. Ca. 220.

(*m*) Coulson and Coulson. 2 Str. 1125. *Ambrose* and *Hodgson*. *supra*. *Sayer* and *Masterman*. Fearne 250. Ambl. 344.

(*n*) *Hayes v. Forde* 2 Black. Rep. 698.

(*o*) Lord Raym. 1 Harg. Tracts, 562.

(*p*) *Lawe v. Davis's*. 2 Lord Raym. 1561.

urged ; and in proof of these positions, other cases will be introduced, in considering the exceptions to the rule.

And it may be assumed as a general position that it is more on the sense and *extent* in which the word heirs is used, than on any other circumstance in a deed, will, or other instrument, that the construction of the several limitations must depend. The observations made on introducing the object of the rule, shewing its political tendency, must now again be called to recollection : and the reader is therefore referred to them. From these observations too it will be easily understood what is meant by a *class* or *denomination* of persons.

In those instances in which there are *superadded* words of limitation, taking notice of the *heirs* of the *heirs*, the influence of the words descriptive of the immediate heirs of the ancestor, must depend on the collective interpretation of the instrument.—Some observations will now be necessary to illustrate this point.

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Though in deeds and wills, words of limitation are added to the gift to the heirs, yet if such additional words are of the same import, or rather not at variance, with the former words of limitation, and are *virtually* included in and expressed by these words, the words of limitation, as used in the first instance, will, notwithstanding the words of superadded limitation, enlarge the estate of the ancestor; vesting in him the interest imported by the limitation to his heirs. Thus in *Shelley's Case* (q), which is the identical case that gives denomination to this rule, a fine was levied by a man to the use of himself *for life*, remainder to the use of the *heirs male* of his body, lawfully begotten, and the *heirs males* of the body of such heirs males lawfully begotten; and, in *Goodright v. Pullin* (r), a devise was made to N. for *his life*, remainder to the *heirs males* of the body of the said N. lawfully to be begotten and *his heirs* for ever: with remainder over, if the said N. should happen to die without such *heir male*; and, in both these instances, and in many similar ones, it was held, that the superadded words

(q) Supra. and see *Gulliver and Ashby*. 1. Black. Rep. 607.

(r) 2 Lord Raym. 1437. Str. 729. See also *Morris v. Le Gay* cited 2 Burr. 1102. 2 Atk. 249. *See A. Burnford*
case 294. 5. Durnford case 299.

words of limitation, being of the same import and extent as those first introduced, and not inconsistent with the nature of the descent, to be pursued in conformity to the mention they made of the heirs, the word *heirs* in the superadded clause of limitation should be a word of limitation and not of purchase.

Not in, in the 2. of the case, & hence the diffi- culty - van.

In this place it will be proper to remark that if the words engrafted on the limitation to the *heirs*, describe an order of succession, totally different from the one which must take place under the limitation to the *heirs* as originally named, and will not admit of the construction, that by the heirs secondly named are meant the heirs in succession of the heirs first named, as the heirs of the ancestor, the words heirs, &c. in the first branch of the limitation, will be words of purchase. This exception is instanced by a gift to a man for life, remainder to his *heirs* and the heirs *females* of their bodies (*s*): also by a devise to A. for life, remainder to his *next heir* male, and the *heirs male* of the body of *such next heir male* (*t*): and these cases have very properly been allowed

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to

(*s*) 1 Co. 96. P. *Anderson*.

(*t*) *Archer's Ca.* 1 Co. 66. b. See also *Luddington and Kime*.

to be exceptions to the rule, or rather not within its extent: for in the first of these instances, the *heirs*, described to be *inheritable as heirs* to the intail, were to be *females*; and in the second instance, the *heirs* to take in succession were to be those heirs only which should be the *issue* of the body of a *particular person*, described by the designation of *the next heir male* of the tenant for life; and the succession, *as the inheritable quality of the estate*, was not, in the first case to be confined to, or to be conducted at all through males, nor in the second case to be extended to *all* the *heirs* of the *body* of the tenant for life; and to have construed the words "heirs" in the former case, and the words "*next heir male*" in the latter case to have been words of limitation would have given them this effect, in direct opposition to a contrary intention, clearly and manifestly expressed, and which shewed that *all* possible heirs were not to be intitled under the *first term* of description.—At the same time it is observable from the adjudged cases, that words of limitation that import a *fee* engrafted upon words which would give an *estate tail* (u); as to J. R. for *life*, remainder

(u) *Wright v. Pearson*, Fearne 187. See also *Dean ex dem Webb v. Puckey*. 5. *Burns & Latt* 59295.

der to trustees for his life, remainder to the use of the *heirs males* of the body of the said J. R. and their *heirs*; and again words which of themselves import a *general intail* engrafted upon words that would give an estate in *special tail* (v); as to R. M. and his *heirs male* of his body and their *issue*; and lastly, in wills, words of clear and proper limitation, engrafted on words of the same extent and import and which have no determinate meaning, but, according to circumstances, may be words of limitation or of purchase indiscriminately; as to A. B. during his natural *life*, remainder to the *issue male* of his body lawfully begotten, and the *heirs male* of the body of such issue male (w), will not prevent the attachment of the rule; for, in all these, and the like instances, the words of superadded limitation are understood and construed to be applicable to those heirs *only* who are within the definite line of succession, described by the first words of limitation.

The three instances last noticed arose upon limitations *in wills*. The same rules of construc-

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tion,

(v) *Minshul v. Minshul*. 1 Tr. Atk. 411.

(w) *Dodson v. Grew*, 2 Wills. 322.

tion, so far as relates to the words of superadded limitation, allowing for the difference of words requisite in deeds and wills, to limit estates, seem to apply to *deeds*; and perhaps it will not be too much to assume it as a general conclusion, deducible from the authorities which have been noticed, that the point of difference furnished by the cases, is that if the superadded words of limitation give a direction to the *course of descent*, different from that which must take place under the former branch of the clause of limitation, the words heirs &c. in that branch of the limitation, will be words of *purchase*, and not of limitation; but if the superadded words are included within, and do not, in their extent, exceed the preceding words, but the words heirs, &c. in the several parts of the limitation are in *terms*, or, at least in construction, of equal extent, the latter words are surplusage, and the preceding ones, as connected with the limitation to the ancestor, will be taken to be words of limitation.

Perhaps in the last of the adduced instances, the construction was influenced more by the rules of interpretation extracted from the essay on estates, than by the rule treated of in this essay ;
since

since to have construed the words issue male to be words of purchase would have defeated the general intention of the testator ; either by giving the estate to a single individual, to the exclusion of other persons within the same description, or by giving the estate to several persons for their lives, with several inheritances, and thereby excluding the issue of each child from the aliquot parts of every other person besides his own *parent*.

When the limitation to the ancestor and the heirs are immediate, or eventually become so, by the determination or failure of intermediate estates, the several interests imported by these limitations, will consolidate, and, by Merger, become one *intire* estate, giving one *undivided time of continuance*. When other estates are limited intermediately, the limitation to the heirs, will, during the existence of these estates, give the ancestor an estate in remainder, to take effect in possession according to the order in which it is limited, in subordination to, and after the determination of, the intermediate estates by which it preceded, excepting only those instances which are the same in principle or in circumstances, as

the case of *Lewis Bowles* (w). In that case all the estates limited mediately between several limitations, one to a man and his wife for their lives, the other to their heirs of their bodies, were contingent; and it was held that an estate tail did execute in the husband and wife, so as to intitle them to be deemed tenants of an estate tail in possession: but *submodo*: so that, upon the vesting of the contingent estates, the husband and wife should be tenants for their lives, with a *remote* remainder in tail.

When an estate of freehold is limited to an individual, and there is afterwards a limitation to the heirs or *heirs* of the body of that person and another, by the same clause and by copulative words (x); thus to A. for life, remainder to the *heirs* or heirs of the body of A. and B. (y); the limitation to the heirs will be construed, as to one moiety to give the inheritance to the ancestor who has the freehold; and as to the other moiety, to give a contingent remainder to the heirs of the person who has no estate of freehold; unless the several persons in the case of a limitation

to

(w) 11 Rep. 80. C. Litt. (x) 3 Leon. 4. 5 Rep. 8.

(y) 2 Rou. Abr. 417. pl. 6.

to the right heirs are husband and wife ; or in the case of a limitation to their heirs of their bodies are married or may lawfully intermarry (2); for then, in the former case the limitation will give the interest which it imports, to their heirs, being the issue of their bodies, originally in *fee*, and in the latter case, *quâcunque via data*, the heirs will be purchasers of an estate tail, without any right in either of their ancestors, arising from the limitation to their heirs.

But on the case of *Roe* and *Quartley* cited in the margin, it is to be observed, that neither of the ancestors took any preceding estate of freehold. Considering this circumstance, notwithstanding the report of 3 Leon. 4. which is to the contrary to make no difference in the law to a limitation in these terms, so as only one of the parties, either the husband or wife, takes an estate of freehold, the case of *Roe v. Quartley* is introduced as an authority to warrant the position as stated, and it is with satisfaction that the name

and

(2) *Roe v. Quartley*. Fearne 44. 47. 85 1. Term. Rep. K. B. 630. 2 R. Ab. 417. H. pl. 1. 2. Dy. 99. 64. 1 Leon. 102. *Lane and Pannel* 1 Roll. Rep. 238. 317. 438. *Frogmorton ex dem. Robinson v. Wharrey* 3 Wils. 125. 2 Bl. Rep. 723.

and positions of Mr. *Fearne* can be vouched in support of the same hypothesis (a). When the husband and wife, or a man and woman who are about to intermarry, have an estate of freehold to themselves *jointly* under these circumstances, the limitation to their right heirs will give *them* the inheritance jointly (b). In the cases cited as in point, to warrant the position so far as relates to the heirs of the bodies of two persons who are husband and wife—one of them had an estate of freehold, and it seems to make no difference in regard to a limitation to the heirs of the bodies of two persons, one of whom only takes a preceding estate of freehold, whether these persons are husband and wife or not, so long as they may lawfully intermarry (c). When both these persons take an estate of freehold, either together or successively, that estate will intitle them *jointly* to the benefit of the limitation to their heirs of their bodies (d).

In

(a) Page 460.

(b) 2 Bl. Rep. 1211. Com. Digby Kyd. Estates, K. 1.

(c) 2 Roll. Abr. p. 417. H. pl. 1. 2. Dyer 99. 64. 1 Leon. 102.

(d) *Coffage and Taylor*, Sty. Rep. 325. *Robinson v. Wlarrey* 3 Wils. 125. 144. 2 Black. Rep. 728. *Stephens v. Bretridge*. 1 Lev. 36. Raym. 36. *Lowe v. Pannell*, 1 Roll. Rep. 258. 317. 418.

In another case a man and a woman, *not his wife*, had an estate for their lives, with a remainder to the heirs of the bodies of the *woman* and her *husband*; and it was determined that the *heirs* should take by purchase (*d 2*).

When the freehold is limited to *several* persons *jointly*, and there is also a limitation to the heirs of the *survivor* of them (*e*), or otherwise, as to such one of them as shall *first* die (*f*), so as to leave the *certainty* of the person whose heirs are to be intitled under the limitation, to depend on the *lapse* of time, or the rise of an *event*, and though the estate to the ancestor must cease, as in the cited instance of a limitation to *two* for their *joint* lives, remainder to the *heirs* of the body of him who shall *first die*, before the objects of the limitation to the *heirs*, taking that word to refer to the legal successors, can be ascertained; or the limitation to the heirs is to give an estate upon a contingency; still that limitation will give to the ancestor the interest which it imports to convey. This interest, it is true, will, under these or similar circumstances, be
contingent

(*d 2*) *Lane and Pannel*. 1 Roll Rep. 238. 317. 438.

(*e*) *Fearne 39. Highway v. Banner and others*. 1 Brown's Ch. Caf. 584.

(*f*) *Fearne 33*. 1 Inst. 378. b.

contingent. The rule however, attaches upon the several limitations, and the ancestor will have the interest, and the same will be transmissible from him to his heirs, and be liable to be destroyed by his act; and the heirs cannot claim to be intitled otherwise than by *descent* from him. In those cases in which the freehold is limited to *two jointly*, and there is also a limitation to *their heirs*, the limitation to the heirs will give an interest to the ancestors jointly (*g*). This is equally true in regard to limitations to heirs generally and to heirs special (*b*), unless the observation in reference to heirs special is applied to limitations to two or more persons, who, either in regard to sex, or relation arising from consanguinity or affinity, may not lawfully intermarry, and the heirs of their bodies; for thus circumstanced, the several ancestors, though they have the estate of freehold jointly, will have several and distinct inheritances (*i*). When the ancestors have several, successive, and distinct estates for their lives, and the heirs to take under the secondary limitation, are

(*g*) Fearne 40. Inst. 183. b. 184.

(*b*) *Roe v. Aistrop* 2 Black. Rep. 1228. *Denn v. Gillott* 2. Term. Rep. (K. B.) 431. Fearne 45.

(*i*) Fearne 41. 1 Inst. 182. 184.

are to be of their bodies, the limitation to these heirs will give an estate of inheritance to the ancestors jointly, [or severally, according to the circumstance that they are, or are not, husband and wife, or persons who may lawfully intermarry (*k*). Thus husband and wife, or persons who may lawfully intermarry, will take the inheritance jointly, and persons who are not already married, and may not lawfully intermarry, will have the inheritance severally and distinctly.

If the ancestors are husband and wife, or persons who may lawfully intermarry (*l*), the limitation to the heirs will give an interest to them jointly. If the ancestors stand in a relation that they may not lawfully intermarry, each ancestor will have a several and distinct estate of inheritance, unless they are husband and wife *de facto*, though not *de jure*; and, being husband and wife in this manner, they will, it is submitted, have the inheritance jointly, or, more accurately speaking, by intireties.

When

(*k*) Fearne 41. 43. *Stephens v. Bretridge* 1. Lev. 36. Raym. 36.

(*l*) Fearne 41.

When the limitation that names the heirs, is descriptive of the heirs of more persons than take estates of freehold, then the observations already made on limitations of the freehold to one and to the heirs or heirs of the body of that person and of one or more persons in addition to him, will lead to the construction of the limitation to the heirs.

In those cases that a grant or limitation is made to *two* jointly, and the heirs of *one* of them (*m*), the limitation to the heirs will give the interest to their ancestor, either by way of immediate estate, so as to be connected with, and form part of, the estate of freehold, subject to the interest of the jointenant, or by way of remainder, according to the form of the limitation, and the circumstance that it does, or does not connect the limitation to the heirs, with the limitation to the ancestor; as to two jointly and the heirs or heirs &c. of one of them, or makes a distinction between the several limitations, and the times at which they are to confer a right

(*m*) Fearn 41. *Wiscot's Case*, 2 Co. 61. *Winchester's Case*, 3. Co. 1. *Franklyn v. Clithero*, Salk. 568.

right to the possession: as to two jointly, and from and after their *decease* to the heirs of one of them (*m. l.*).

This seems to be the law on the subject, yet the point that the limitation to the heirs will give a *remainder*, when it is distinct from the limitation to the *ancestor* and another person *jointly*, is not sufficiently clear, from the determined cases, to be relied on as decisively settled.

In *Owen's (n) Case*, the husband and wife were seized, under limitations to them and the heirs of the body of the husband, and the husband alone suffered a common recovery with *single* voucher; and, upon the ground, that his wife had a joint estate with him, and that there are no moieties between husband and wife, it was held that the recovery did not bar the *issue* or *remaindermen*: and in the *Marquis of Winchester's case (o)*, limitations were made to a man, and a woman not his wife, and the *heirs* of the body of the *man*, and a recovery he suffered with *single* voucher of the *intirety*, was held to be good for one moiety. Now both these cases were determined upon the
ground

(*m. l.*) Litt. § 578. Perk. § 88.

(*n*) 3. Co. 5. Mo. 210.

(*o*) 3 Co. 1.

ground that the man had not an estate tail in possession ; in the Case of *Owen* in any part of the lands ; and in the Case of the Marquis of *Winchester* in any more than one moiety ; and yet in the case of *King* and *Edwards* (p), it was held, under similar circumstances, that the estate tail was so far executed in possession, that a *feoffment* by the tenant of that estate created a *discontinuance*.

It is advanced too by Mr. *Wooddeson* (q), in a note to his *Vinerian Lectures*, that “ If the particular estate be to A. and B. *jointly* for their lives, remainder to the heirs of the body of B. this will be an estate tail in B. executed in B. so as to make the inheritance not grantable *dis-tinct* from the particular estate of *freehold*, by way of *remainder*, but on the other hand, not to sever the jointure, or entitle the wife of B. to Dower.” 1st *Fearne*, 41. 42. 4th Edit. is cited for these positions, and it must be acknowledged that such conclusion is drawn by that very able writer, from several instances of limitations which he has introduced, and on which he has observed. It is also true that in one of these instances the limitations were to A.

and

(p) Cro. Car. 320.

(q) 2 Vol. 205.

and B. for their lives, and after their deaths to the heirs of B. as stated by Mr. Woodeson. The other instances are, 1st. a limitation to husband and wife and the heirs of the body of the husband; 2dly. a limitation to two men, and the heirs of their two bodies, or to the heirs of the body of one of them; and in both these instances, the several limitations were made by one connected clause. Whether it was to these instances alone, that Mr. *Fearne* intended to confine the observation, that the interest imported by the limitation to the *heirs*, was not grantable away from, or without the freehold, by way of *remainder*, is not clear.

In the paragraph immediately preceding (r) the one selected, that gentleman advances these positions, "When there is a joint limitation of the freehold to several, followed up by a joint limitation of the inheritance in fee simple to them; as an estate to A. and B. for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is both joint, it seems the fee vests in them jointly; and so if the limitation of the freehold

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" be

(r) Page 40.

“ be to the Baron and Feme jointly, remainder
 “ to the heirs of their bodies, it is an estate tail
 “ executed in them, as they are capable of issue,
 “ to whom such joint inheritance can descend—
 “ But if the limitation of the freehold, be not
 “ to them jointly, but *successively*; as to one for
 “ life, remainder to the other for life, remainder
 “ to the heirs of their bodies; there it seems the
 “ ultimate limitation is not executed in posses-
 “ sion, but gives them a remainder in tail,”

The distinction, then, perhaps, turns on the point that the ancestor has several and distinct estates, or one intire estate; making the difference to be, that when the ancestors have a joint estate, the limitation to the heirs, even of one of them will connect and unite with the estate of that person; forming one intire *inseparable interest*; and that when the estates to the tenants for life are several and distinct, to take place successively, the limitation to the heirs of one, or both of them, will give a *distinct interest* by way of remainder.

Without attempting to solve this point, since no certain conclusion can be drawn, it may be argued

argued, and, it should seem, relied on, that when several *limitations* give *several* and *distinct* estates, the remote estates depending on preceding ones, must be remainders; and being distinct estates, and assuming this description, there can be no objection to the transfer of such interests, separately from the estate of freehold, as *remainders*; and since the estate has the name, and all the qualities of a *remainder*, and (which is the essential point and distinguishing circumstance) is distinct from the estate of freehold, what reason can be urged against its conferring the same privileges as are annexed to other estates of the same denomination?—It follows that the interest passing by the limitation to the heirs, is improperly called a remainder, or has all the qualities common to estates comprehended under, and embraced by that term of definition.

When the freehold is limited to two as *tenants in common*, and there is a limitation to the heirs of one of them, it is difficult to decide, whether the estate limited to the heirs will give, as to one moiety, an interest to the ancestor; and, as to the other moiety, an interest to the heirs, by way

of contingent remainder ; or as to both moieties, a contingent remainder to the heirs.

It seems most probable, indeed pretty clear, that the inheritance will be in contingency as to one moiety ; and, as to the other moiety be vested in interest. There is still greater difficulty in determining on the construction to be made on a limitation to two as tenants in common, with a distinct limitation to their heirs of their bodies. Perhaps it will again be necessary to recur to the distinction arising from the condition of the parties, that they are married, or may not lawfully intermarry. For it seems consonant to the spirit of the law, discoverable from decisions in other cases, that in those instances in which the persons may not lawfully intermarry, the limitation to their heirs will give them the inheritance as tenants in common ; and that this limitation will give them the inheritance jointly in those instances that they are married or may lawfully intermarry.

To determine on the effect of a limitation to more than two persons, of whom two or more may intermarry, or are actually married

married, for their lives with a remainder to their heirs of their bodies, is a task of too much difficulty to be undertaken.—On this subject some conjectures are offered in the chapter on estates tail, contained in the essay on estates,

The great object of the rule, as has been already noticed, is, from the limitation to the *heirs*, to raise an interest to the ancestor. The circumstance that the ancestor takes an estate under the limitation to his heirs, renders that limitation of the same effect, as if it was made to him and his *heirs*, or his heirs of his body; insomuch that the heirs cannot take as *purchasers*, though, by reason of his death in the life-time of a testator, or for any other cause, the limitation of the estate of freehold shall be or become void as to *him*; for the limitation to his *heirs* will also be void. This was determined in the case of *Hodgson and Ambrose*, which has been so often mentioned. Nor does the rule interfere with the *quality* of the estate, to make it *vested* or *contingent*, otherwise than by establishing the point, that the interest cannot be contingent, merely from the circumstance that the heirs of a particular person who is living, are, in terms, the object of the limitation.

It is too much however to concede the position inferred from *Brooke* (s) that the heir shall be in as heir, if by any possibility his father might have had the possession; supposing that by this position it is to be understood that the limitation to the heirs will give a *vested* interest in every case in which the ancestor becomes intitled under that limitation. That position must be confined to the *manner* in which the heir is to claim, without any regard to the quality of the father's interest; and now since it is settled that the ancestor will be intitled to the benefit to be derived under the limitation to his heirs, though it is *impossible* for that limitation to give a vested interest in his life-time, the position cannot be cited to any purpose. So far from being law in point, to prove that the limitation to the heirs cannot give a contingent interest, in those instances, that the ancestor is to be intitled under that limitation, the contrary position is clearly established. Grant that either from the uncertainty of a person, whose heirs are within the terms of the limitation; or of the event upon which this limitation is to have effect; or, probably, from the consideration that the ancestor's estate of freehold, may determine

(s) Fearn 36.

mine before the limitation to his heirs can possibly come into its place, in point of right to possession, by reason of words which refer to some other time than his death, or the determination of his estate; as the death of B. the marriage of C. or of himself; making it necessary in order to the commencement of the estate passing under the limitation to the heirs, that some act shall be done, event take place, or time elapse, which is in no wise connected with the determination of the preceding estate; or is connected with the determination of the preceding estate, only as the determination of that estate depends on a *contingent event*; the limitation to the heirs would pass a contingent interest, in case that limitation was made to any individual, or description of persons; and the interest to pass by the limitation to the heir's will, notwithstanding the rule, for intitling the ancestor, to the interest imported by that limitation, be contingent. On the other hand, notwithstanding the ancestor's estate of freehold may *determine* in his life time, and consequently before any person can answer the description of his heirs; as to A. during her *widowhood*, remainder after her *decease* to her heirs; or to husband and wife for their *joint* lives, and after the death

of *either* of them, to the *heirs* of the body of the wife by the husband to be begotten ; the interest imported by the limitation to the heirs, will not be contingent *merely* for that reason.

The last instance which is adduced, is taken from the case of *Merrel and Rumsey (t)*, in which it was argued, that the remainder, depending on the estate to the husband and wife for their joint lives, *being* limited to the heirs of *one of them*, so that it might be frustrated in case the wife should survive, and that it was therefore contingent, because by the death of the husband, the estate for life would determine, and the heirs of the body of the wife by the husband, could not take, because *nemo est hæres viventis* : and it is observable that this argument proceeded upon a supposition that the limitation to the heirs, (not from the terms in which it was introduced, for they provided for the death of the husband in the lifetime of the wife, by limiting the estate in remainder, to commence on the death either of the husband *or* wife, but from the objects of the limitation, considered as *uncertain* persons) gave an interest which could not take effect in possession

(t) 4 Bac. Abr. 303. *supra*.

sion, *till the* decease of the wife, and that it must be contingent, because the particular estate might determine before that event ; but by the court, clearly, and with some displeasure at the argument, the words *heirs* &c. are not words of *purchase*, but of *limitation* to the wife ; and the estate vests in her *presently*, and is not in *contingency* ; as if an estate be limited to a woman *durante viduitate*, remainder to her *heirs*, or the *heirs* of her body, this is a *fee simple* or *fee tail* executed in her *presently* ; and though she afterwards *marries* yet that shall not destroy the estate that was vested and well settled in her before, and here the remainder closes with the particular estate to all purposes, but dividing the jointenancy, and is no more than an estate to the husband and wife, and the heirs of the body of the wife.

From the opinion then delivered in this case, it is a fair inference that the limitation to the heirs will give a vested interest, in all those cases in which it will give an interest of this sort, if limited to the ancestor and his heirs. The spirit of the rule, and the decisions thereon lead to this conclusion.

There

There are passages in *Fearne* (u) that seem to favour a contrary opinion. That opinion, however, respectable as it is, and fully as it might have been considered by the learned writer, cannot be opposed to the express determination in *Merrel* and *Rumsey*; and in short Mr. *Fearne* does not seem to advance it as a position, that the estate is *contingent*. All that he seems anxious to have established, is that the limitation to the heirs, connected with an estate of freehold in their ancestor, must, *at least* give a *contingent* remainder to the ancestor, and that the heirs can not be *purchasers*, though it is possible that the limitation to them may not, or although it is impossible it ever should, even give a *vested* interest to the ancestor. And it is observable too, that Mr. *Fearne* (v) has said in so many words the better conclusion seems to be, that the possibility of the freehold determining in the life of the ancestor, does not keep the subsequent limitation to his heirs from attaching in himself as a *vested interest*. This passage then removes all doubt of his opinion.

The

(u) Page 33. 38. 39.

(v) Page 37.

The doctrine of the Rule extends to all *sorts of instruments*, by which limitations of estate are made ; and to limitations upon surrenders of *copyholds* ; with some difference of construction, in point of strictness, according to the nature of the instrument, (as *deeds, wills or articles*) in which the limitations are made, and the object and tendency of the provisions in these instruments and the nature of the interest which they confer ; and, generally speaking, and with the observation which has been made, that the several limitations must both give either *legal or equitable* interests, it extends as well to trusts that are executed, as to legal estates, excepting those cases of trust which have circumstances indicative of an intention contrary to and incompatible with, the effect that would attend the construction that the heirs are to take by succession in a course of descent. In these, and, in short, all other cases, the manifest intention precludes the application of the rule. In regard to trusts which are executory, and leave the *direction of a conveyance* to devolve on the Court of Chancery, by making it necessary that the trustees shall act, and, of course, that this court shall interfere to see that act properly done, that court, which has
exclusive

exclusive jurisdiction of interest of this sort, will consider the object of the parties, and, notwithstanding the rule under consideration, will decree limitations of estate, agreeable to the manifest intention; whether that intention is to be collected from the nature of the instrument; as *marriage articles*, and the persons they generally have in contemplation, and for whom they intend at least, if not profess, to provide, as the *children* of the marriage; or from expressions which clearly shew that the estate of the father is not to be enlarged by the limitation to his heirs, and that by the limitation to the heirs, *children* *quatenus children*, and *their issue*, and not hereditary successors, as a collective class of persons, are meant; the court *proceeding* upon the notion that the rule is controulable by arguments of intention, that, applied to legal estates, or *even trusts that are executed*, would be of no weight (w). Limitations in marriage articles are always considered, as raising *executory trusts*, unless the parties, *previous to their marriage*, carry these articles into execution by a *settlement* in fact. When such settlement is made previous to the marriage, the articles are annulled, and no resort can be
had

(w) Fearn 71.

had to them: as it has been said, upon the ground of a supposed *change of intention*, but, it is submitted, rather for *want of jurisdiction*. To the general terms of these positions, there is an exception, arising from the fact, that it appears on the *face* of the settlement that the parties had the articles in their contemplation, and that the settlement was made in *pursuance* of, and with a view to perform the articles; and, under these circumstances, the Court of Chancery will resort to the articles, and decree an execution of them, by limitations in *strict settlement*; construing the words *heirs of the body*, to mean *first and other sons and their heirs* &c. according to the usual forms of settlements; and inserting estates to trustees to *support and preserve* the *contingent estates* of freehold; and by that means insure effect to the intention of the parties.

That a trust raised by *deed* not being *marriage articles*, or by a *will*, may be deemed *executory*, it must appear, by express declaration, that the trusts are to *convey* &c. so that the Court of Chancery is intitled to interfere, and direct the mode in which the trust shall be performed. This, indeed, is a subtle distinction; but it appears to be clearly established (x). It

(x) *Glenorchy v. Bosville. Ca. Temp. Talb. 3.*

quere does not the want of jurisdiction arise out of the necessary presumption of a change of intention

q. since the jurisdiction arises on the reference & subsequent acts to be performed by the trustees.

It will now be proper to consider the exceptions to the rule. They naturally fall under an arrangement, that makes it most eligible to consider them, as arising on limitations of the legal estate, limitations of *trusts* that are *executed*, and trusts that are *executory*.

In treating of the exceptions it will be material to advert, under each head of division, to the difference of construction of similar limitations in *deeds* and *wills*, and to preserve this division, and distinct view of the subject.

To limitations of *legal estates made by deed*, this rule applies uniformly and invariably, with an exception of these instances only, in which the freehold is limited to one person, and the second limitation is to the heirs of *that person* and *another* who are husband and wife; or the heirs of the bodies of that person and another who are already married or may lawfully marry; so that the persons described are to be the *common heirs* of their two bodies, not the respective heirs, or heirs of the body of each several person (y):—or words of *engrafted limitation* prescribe an order of

(y) See Supra.

of succession *totally different* from the one that must take place under the limitation to the heirs of the ancestor; as in the example put by *Ander-son* of a gift to A. for life, remainder to his *heirs* and their *heirs females* of their bodies (z); the example as to *trust* estates (which is understood to be also applicable in its *principle* to legal estates) afforded by the case of *Allgood* and *Wilbers* (a), in which, by declaration of trust, equitable interests in lands were, by deed, limited to W. for life, remainder to the *heirs* of the body of the said W. and of G. and M. and their heirs, executors, administrators and assigns: *or* the word *heirs* appears, by some expression in the same deed, to be used as analogous to, and of the same import only with the word *son* or *child*; and this is clear from a *reference* to such term of description; as in *Archer's Case* already cited, the principle of which seems equally applicable to *deeds* and *wills*, and which case is also open to the observation that the superadded words of limitation, confined the succession to the *heirs* of the *next heir male* of the tenant for life and made that

(z) *Supra*.

(a) In Chan. in 1735. cited 2 Burr. 1107. 1 Vez. 150.

2 Atk. 582. 2 Vez. 648.

that heir the flock or ancestor, and, consequently prescribed an order of succession materially different from, because far less comprehensive than, the one which must have taken place, under the construction, that the words "*next heir male &c.*" were words of limitation, and in *Walker and Snow (b)*, which arose on a *fine* levied to the use of A. for life, remainder to the use of his *first* son, and of the heirs males of his body, with like limitations respectively to his 2d, 3d, 4th, 5th, and 6th sons, remainder to the *right heirs of A. to be begotten* AFTER the *sixth* son, and of his *heirs male*; and in *Lisle v. Gray (c)*, which arose on a *covenant* by A. to stand seized, to the use of himself for *life*, remainder to the use of E. his son for life, remainder to the use of the *first* son of the body of E. and the heirs males of the body of such first son, with like limitations to the 2d, 3d, and fourth sons, by distinct clauses, in tail male, with the following declaration, at the end of the limitation to the fourth son, "*And so severally and*
" respectively to every of the HEIRS MALES of the
" body of the said E. and the HEIRS MALES of the
" bodies of such HEIRS MALES, according to their ages
and

(b) Palm. 359.

(c) 2 Lev. 223. Raym. 278.

"and seniorities." And for default of such issue then over; or from words of *explanation* as in *Low v. Davies* (d): in which case A. devised to B. and his heirs lawfully to be begotten, that is to say to his *first*, second, third, and every *son* and *sons successively*, lawfully to be begotten of the body of the said B. and the heirs of the body of such first, second, third and every other son and sons successively, lawfully issuing, as they should be in *seniority of age* and *priority of birth* the eldest always and the heirs of his body, to be preferred before the youngest and the heirs of his body, remainder over: or the heirs are not to have the *inheritance* as in *White and Collins* (e), in which case the secondary limitation was to the *heir* for the term of his *natural life*, by words of express and definite limitation that confined the estate of the heir to that exact and certain period, thereby giving him a particular estate in direct terms, and negating the conclusion that the *heirs* were to have an estate of a descendible quality.

In the first of these cases, since the heirs of the two persons were not to take *distributively*, but

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were

(d) 2 Lord Raym. 1561.

(e) Comy. Rep. 289.

were to take jointly as answering the description of one *common* heir, the ancestor could not be intitled to all or any purparty of the lands, in respect of the limitation to the heirs. To have given him any purparty would have been to put different constructions on the same words, in application to the same subject matter, which equally allowed of that construction, or excluded it in respect of every part; and to have given him the whole, would be to allow that the rule extends to those instances, in which the heirs, who are named, are to be the heirs of the ancestor and another person; and this is carrying the rule beyond its terms or its principle.

In the five following cases, beginning with the one proposed by *Anderson*, the heirs took originally in their own right; and the engrafted words of limitation, described the order of succession from them as the stock or first purchasers; for in the first of these cases the ancestor would have taken an estate in fee, allowing that the limitation to him and his heirs gave the inheritance to him, while from the superadded words of limitation, the intention of the parties was clear, to create an estate in tail *female*, to commence

mence in, and be deduced from, the *persons* who should be the *heirs* of the ancestor. In the 2d. of these cases it was clear, that the heirs of the bodies of W. G. and M. were *all* to take an interest of the same sort; and that the persons who should be the heirs of the body of G. and M. were to have a *fee*, was equally clear from the words of superadded limitation, while to have construed the limitation to the heirs of the body of W. to have given any interest to their ancestor, would have been to create an intail in him, and to have put on these words a different import from what they bore in regard to the heirs of the body of R. and M. and to have rejected the superadded words of limitation as having no meaning, so far as they related to the heirs of the body of W. In the third of these cases the father of the next *heir male*, would have taken an estate in tail male, had the rule been applied to this case; while the words of limitation were to the *heirs male* of his next heir male, from which it was manifest, that the words *next heir male* were used in designation of a *particular* person, of the person in whom the description of *heir male* should be first fulfilled and that the words and *to his heirs &c.* were words of limitation,

ascertaining the duration of the interest, or continuance of the estate he was to have, and which estate was not equally extensive with the one that would have passed under the construction, that the father of the next heir male had an estate tail; for an estate in tail male in him would have intitled all his sons and their male issue to have been inheritable, while the words of the devisee confined the estate to the next heir male and his heirs *males*, and, consequently, excluded all the other sons and their descendants. In the Fourth Case the words "*right heir*" and in the Fifth Case the words "*heirs males*," as appeared by the context, were clearly used in the same sense, in the *first* of these two instances, as the *seventh son*, and in the *second* of these instances as *every OTHER son after the fourth*, in succession, according to the priority of his birth; and the superadded words of limitation, engrafted on the words used in designation of the persons, and as declaratory of the order of succession, expressed the meaning of the parties, in a manner and in terms, that left no room for a doubt upon the intention; and in *White and Collins* the limitation to the heirs in express terms, for a *definite* period of time, clearly demonstrated an intention, that

that the *heir* should take as a *purchaser* in his own right, and for a *particular* estate; and since he was not to have the *inheritance*, the terms of the rule do not comprehend a case of this description. This case also arose upon a devise in a will, but it is apprehended that a similar case arising in a *deed*, is open to the same observations, and to be determined by the same rules of construction, and that it is the particular circumstance under which the limitation is penned, and not the nature of the instrument which precludes the application of the rule. Perhaps the gift by deed to a man *for life*, remainder to his *heir* in the *singular* number, with or without words of designation, and with words of superadded limitation or procreation so as to create an intail, will form another exception; partly, indeed principally, upon the ground that the word *heir* in the *singular* number, cannot *in deeds*, be considered as describing the whole class of legal and inheritable successors. And it has been noticed and instanced by the Case of *Shelley*, that the rule applies, though to the words heirs males of the body, other words of limitation, seeming to import a class of persons as their successors, are added. The rule also applies, though, between the seve-

ral limitations to the ancestor and his heirs, or heirs of his body *in deeds*, there is interposed an estate to *trustees* to support *contingent* remainders, and there are no contingent remainders to be supported unless the limitation to the *heirs* is construed to give an interest of that sort (*f*); and it applies also, though there are other provisions; as that the tenant shall not be impeached, or which is the same that he shall be dispunishable for waste; or shall have power of leasing &c. for which there can be no manner of occasion, unless the intention of the parties is that the ancestor shall be merely tenant for his life, and the limitation to his *heirs* give an interest to *them* originally, in their own right, and as *purchasers*.

In wills the rule applies generally, and without exception, to the several limitations, as often as the one to the *heirs* has no expression of qualification, restriction, or description, to shew that the word heir, or heirs, was used in designation of some particular person; or that word does not in fact, nor in intention, comprehend all the objects

(*f*) *Hodgson and Wife v. Ambrose* supra. *Coulson v. Coulson*
2 Stra. 1825. 2 Tr. Atk. 246.

objects within the extent of this term in its general, technical, and strict legal signification. Neither the express declaration that the ancestor shall have an estate for his *life* AND *no longer* (g); that he shall have *only* an estate *for life* in the premises, and that, after his decease, it shall go to his heirs of his body, and, in default of such heirs, *ver* in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator (h); that the ancestor shall be tenant for his *life* and NO LONGER, and that it shall not be in his power to sell, dispose, or make away with any part of the premises (i); nor a provision that the ancestor shall not be impeached for waste; nor that he shall have a power of leasing or jointuring; nor the interposition of an estate to trustees to support *contingent* remainders (k); nor a direction that the heirs (the devise in the case relied on having been made to B. for life, remainder after his decease, to his heirs males of his body lawfully to be begotten, and the heirs

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males

(g) *Robinson v. Robinson*, 2 Vez. 225. 5 Brown's, Par. Ca. 278.

(h) *Thong. v. Bedford* 1 Brown's Ch. Ca. 213.

(i) *Hayes v. Forde* 2 Black. Rep. 698.

(k) *Hodgson and Ambrose and Coulson and Coulson* supra.

males of the body of every such heir male, without any mention of sons or children, or any other reference of the word heirs, beyond its legal and natural meaning, to persons of this description) shall take SEVERALLY and SUCCESSIVELY, as they shall be in PRIORITY OF BIRTH: every elder and the heirs male of his body to be preferred to every younger; will change the word *heirs* &c. into words of purchase (*l*); nor will the word *first* next, or *eldest*, subjoined to the word *heirs* in the *singular* number, or to the word *heirs* in the *plural* number, be sufficient of itself, for this purpose, unless attended with words of engrafted limitation, clearly shewing that *particular persons* were in the contemplation of the parties, and singly and individually the objects to be ascertained under the description of *heirs* of *their* ancestors. Without such special indication of intention, this word of reference will, in construction of the words heirs &c. be understood to mean nothing more, than that the person, who, for the time being, shall be the *first* in the line of succession,

(*l*) *Legate v. Serwell*, 1 P. W. 87. See also *Jones and Morgan*, 1 Brown's Ch. Ca. 206. 7 Brown's Par. Ca. 136. *Miller v. Seagrave*, Robinsons Gavelkind, 96. Fearne 289.

succession, is the object to be preferred, and the person who is designed to take under these words.

Nor will words of superadded limitation *always* make it necessary, to construe the word heirs in the first instance, to be words of designation or purchase (*m*). That the word heirs may have this construction, the words of superadded limitation must vary, and be wholly inconsistent with, the line of succession imported by the first mention of heirs, as in the several cases already noticed, and therefore in *Wright* and *Pearson* (*n*), a case which arose upon a devise, in trust for A. for life, remainder to trustees to support contingent remainders, remainder to the use of the *heirs male*, of A. and their *heirs*) and in *Goodright v. Pullyn* (*o*), (a case which arose upon devise to N. for life, remainder to the *heirs male* of his body lawfully to be begotten, and his heirs for ever) it was held that the several devisees took estates tail, under the limitation to *their heirs*; and, of course, the words heirs &c. were construed to be words of limitation; and in the case

(*m*) Fearne 287.

(*n*) Ambl. 358.

(*o*) 2 Lord Raym. 1437. and *Minshul v. Minshul*, 1 Tr. Atk. 411.

case of *King* and *Burchell* (p) the devisee was to I. H. for life, remainder, after his death, to the *issue male* of his body, and to *their heirs*; and for want of such issue to W. R. his heirs and assigns for ever: and Lord Keeper *Henley* determined that I. H. took an estate tail, and that a proviso for imposing a charge on the estate, in favor of the person next in remainder, in case of alienation &c. by I. H. or his *issue male*, or (they, as well as the issue male, being named to take under limitations of other property) *issue female*, was void. The difference between these cases, and others which, on a first impression, appear to be similar in their circumstance, may, with a little attention, assisted as that attention will be, by a reference to the principles and grounds of the several determinations, be easily discovered. On the reason which influences the determination of these cases, notice has already been taken in different parts of this essay.

That the word *heirs*, in reference to limitations of legal estates, may be a word of purchase even in a will, it must, in terms, be explained to be of the same import with the word *children*, and
used

(p) Ambl. 378. *Dodson v. Greville*, 2 Wils 322.

used to describe them, without extending to the whole line of successors ; as in the cited case of *Lowe v. Davies*, which was a devise “ to B. and “ his heirs lawfully to be begotten, that is to say, “ to his *first*, second, third, and every other *son* “ and *sons* successively, lawfully to be begotten, of “ the body of the said B. and the *heirs* of the body “ of such first, second, third, and every other son, “ and sons successively lawfully issuing, as they “ should be in seniority of age, and priority of “ birth ; the eldest always, and the heirs of his “ body, to be preferred before the youngest and “ the heirs of his body ;” or they must be used, and be interpreted, in this sense, or otherwise can have no effect, according to the intention with which they are introduced in the will, “ as to A. “ and her heirs of her body, lawfully begotten, or “ to be begotten as well *females* as *males* and *their* “ *heirs and assigns* for ever, to be equally divided “ between them, *as tenants in common*, and not as “ jointenants (q),” or they must be used to describe a *particular person*, either as an *individual*, selected out of the class of heirs, and in whom that description is to be fulfilled, confining the estate in its extent

(q) *Doe v. Laming*, 2 Burr. 1100. 1 Black. Rep. 265.

extent to that individual, as in *White* and *Collins* (r), or enlarging his estate by giving an inheritable interest to be derived from him, as the ancestor as in the case of *Archer* (s); in the former of which cases the devisee, as has already been stated, was to F. for his life, remainder to the heir male of his body lawfully begotten during *the term of his natural life*, and in the latter, the devise as has also been noticed, was to A. for *life*, remainder to the *next heirs male* of A. and to the *heirs male* of the body of such next *heir male*; or the word must be used as ascertaining a person already in existence, giving an estate to him immediately; *as* to A. for life without impeachment of waste, and, after the decease of A. then to the heirs male of the body of A. *now living* (t) 'Tis true that one of the reasons assigned by the Court for its determination of the last noticed case, was that the several limitations gave interests of different sorts, one a legal the other a trust estate; but it is also clear that the Court thought the case warranted a determination upon the grounds noticed in this essay.

In

(r) *Supra.*(s) *Supra.*(t) *Burchett v. Durdant* Vent. 2 311. 2 Lev. 232.

In proposing these instances of exception, the grounds on which they received the construction affixed to them, and to which similar cases are intitled, is proposed in a manner that supercedes the necessity of any comment on each particular case: all therefore that remains to be done is to point to the circumstances by which the case of *Lowe v. Davies* is to be distinguished from *Legate* and *Sewell* and *Jones* and *Morgan*, since there is some degree of resemblance between these cases, though they stand as opposites furnishing lines of distinction. In the case now introduced the testator explained the meaning that he imposed on the word heirs, in the sense he used them. He not only declared that he meant that they should take severally and successively, according to the priority of their births; he in terms said more; he directed that they should take under the names of his *first* and other sons, and not under the *general* and *collective* term of his heirs, and added a limitation to the heirs of those persons. For in this case the construction did not depend on the technical sense of the words heirs of the body, but on the particular sense and meaning that the testator had annexed to them, and which he in so many words had declared

clared to be the same in sense as his *first &c. sons*, while in the cases of *Legate* and *Sewell*, and *Jones* and *Morgan*, the construction rested merely on the direction that the heirs should take *severally* and *successively*, and there was no such direct explanation of the meaning of the words heirs of the body, as shewed that the testator used them in any other than their technical sense, and as embracing, *uno flatu*, the class of persons who should successively answer the description of all possible heirs.

In wills the word *issue* may be a word of limitation, and, connected with an estate of freehold in the ancestor, give an estate tail to him. In *deeds*, operating by way of conveyance, it is always a word of *designation*, descriptive of the *persons* who are the objects of the gift; and is never construed to be a word of limitation. It is a word of less determinate meaning than the word *heirs*; and, in wills, depends for its construction more upon the intention of the parties, than upon the strict rules of law. As often as it is used generally, as extending to issue from generation to generation, it is, with the exception noticed in a future page, and instanced by *Glenorchy*

chy v. Bosville, a case on *executory trusts* (u), a word of limitation, and will give the ancestor, taking an estate of freehold, an estate tail; for the word being introduced in this collective sense, it receives the same construction as the word heirs of the body would have done. On the other hand, if it is applied with a meaning that makes it synonymous with the immediate children, and this appears from superadded and uncontrouled words of limitation, descriptive of an order of succession, different from the one imported by the limitation to the issue: as to B. for life *Sans waste*, and in case he shall have an issue male, then to such issue male and his heirs for ever (v); or from words of restraint, shewing that the ancestor is to have only an estate for life, and superadding words of limitation on the gift to the issue; as to one for life *only*, and after his decease to the issue male of his body, and the heirs male of the body of such issue (w); it will be a word of purchase. In the last noticed case the restrictive word "only" determined the construction.

For

(u) *Supra* and *infra*.

(v) *Luddington and Kime*, Lord Raym. 208. 1 Salk. 224.

(w) *Backhouse v. Wells*, 1 Eq. Abr. 184. 127. and see the Note to that Case.

in Fearne Bastard's case the limitation is very differently reported. it is "and in case he shall have issue male, then to such issue male & his heirs for ever" - and not to the heirs male of such issue as here stated; which makes a considerable difference

For in another case, subsequent in point of time, a devise was to one during the term of his natural life, and from and after his decease, to the use of the *issue male of his body* lawfully begotten, and the heirs male of the body of such issue male, and for want of such issue male, remainder over (x), and it was determined in the Court of Common Pleas, that the ancestor took an estate tail, and one judge said, he thought too great regard had been paid to the words heirs male of the body of such issue; so that the only possible difference between the two last cited cases, that can make them distinguishable from each other, and be understood as contrasted authorities, is that in the former of these cases, the word only was added to the limitation for life, and expressed an intention that the estate of the person, taking under that limitation, should be confined to this exact period; and that in the latter of these cases, there was no such addition, nor the addition of any other word of declaration beyond the words of express limitation.

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Whether such declaration ought to be decisive, is submitted to the reader. The writer of these

(x) *Dodson and Grew*, 1 Wils. 322.

these observations cannot do less than say, he thinks that the question, in cases of this sort, depends rather on the inquiry, whether the *heirs* are to have the inheritance, *quatenus* they are the *heirs*, and as a class of persons, than whether it is the *intention*, that the *ancestor* shall have an estate for *life*, and no estate of a greater *extent*.

Limitations of *trusts* which are *executed* (y), are, in deeds and wills, construed by the same rules as similar limitations of legal estates in similar instruments, as often as this can be done, without manifest violation of the *express* intention of the parties; and therefore, generally speaking, limitations of trusts which are *executed*, whether contained in deeds or in wills, receive the same or a similar determination, that, with a view to the different instruments, the same cases would receive, if considered as giving legal instead of trust estates (z). For the construction on limitations of trust estates, is to be the same as on limitations of legal estates, unless the intention of the author of the trust is *apparently* and *clearly* different, and this is manifest, by plain and direct

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(y) *Jones and Morgan*.

(z) *Bagshaw v. Spenser*, 2 Tr. Atk. 583

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(y) Jones and Morgan.

(2) *Bagshaw v. Spenser*, 2 Tr. Atk. 583

expression, exhibiting circumstances, or necessary implication affording conclusions, which preclude the construction that would give the ancestor an estate of *inheritance*, and point to the mode in which the heirs may take as individuals particularly described. The mere circumstance that the ancestor's estate is for the express period of his life; to be dispunishable of waste; to be attended with a *power of leasing*; that the life interest is to be a separate estate; that trustees are substituted, to support *contingent* remainders; that, to the limitation to the heirs of the body, words of limitation to their heirs generally, are added; or that, in addition to the provisions that the ancestor shall take for life, that his estate shall be with impeachment of waste, that trustees, to whom an estate is devised for his life, shall support *contingent remainders*, or without such addition, these are words declaratory, that the heirs shall take *severally, respectively, and in remainder, the one after the other as they shall be in seniority of age and priority of birth* (a); or that the heirs shall take by *purchase* (b), will not prevent the application of the rule; and, of course, the

(a) *Jones and Morgan Supra.*

(b) 2 Lord Raym. 1561.

the word heirs &c. will be a word of limitation and not of purchase. At the same time that these positions are advanced, it must be acknowledged that the case of *Bagshaw and Spencer* (c), a case which arose on a will, if not over-ruled by the more modern determinations in *Wright and Pearson* (d), *Austen and Taylor*, and *Jones and Morgan* (e), is an authority, that the circumstances that a provision is made, that the ancestor shall not be punishable for waste, and that an estate is devised to trustees to support *contingent* remainders, will, of themselves, in the case of a trust executed, change the words heirs &c. in a *limitation* to them, after a limitation to the ancestor for life, into words of *purchase*, and make these words, in the constructive exposition of a court of equity, exercising its controuling power of interpreting instruments by the presumable intention of a testator, of the same import as limitations to *first* and *other Sons* &c. *successively* in tail, in strict settlement. In delivering his reasons for this determination, Lord *Hardwicke* observed, that the great difference between the present case and

See Mr. Fearn's opinion as to the want of authority of *Bagshaw & Spencer*

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that

(c) *Supra*.

(d) *Ambl.* 358. *Fearne* 187.

(e) *Ambl.* 376. *Supra*.

that of *Coulson and Coulson (f)*, which was pressed upon him as a decisive authority for construing the words heirs &c. to be words of *limitation* and not of *purchase*, was, that this was a devise of a *trust* in equity, that of mere *legal* estate; the words of which must be taken as they stand, according to their strict legal determination; that in the case of *Bagshaw and Spenser* then before the Court, all the limitations were the direction of a trust which the Court was bound to carry into execution, according to the intention of the testator; and as to the difference urged to him between *trusts executed* and *executory*, he observed that the distinction had never been established by any direct decision, for that all trusts, in notion of law, were *executory*, and to be carried into execution by the Court by *Subpœna*.

Since this case was determined, many cases with similar, and others with stronger circumstances in favor of the heirs as *individuals*, have been the subjects of litigation in the Court of Chancery (g), and, in no case whatever, of a trust executed, have the words heirs of the body, following a
limitation

(f) 2 Str. 1125. 2. Tr. Atk. 246.

(g) *Wright and Pearson. Jones and Morgan, Supra.*

limitation to the ancestor for his life, been held to be words of purchase or received any other or a different determination, than the same case, considered as involving questions on limitations of legal estates, would have received.

And it is extremely difficult to shew what those circumstances are, which evince such an intention, as makes it necessary to construe the word heirs to be a word of purchase; otherwise than by referring to the cases already introduced, as arising on questions respecting *legal estates*, and determined to have been exceptions to the general rule, that the word heirs is to be construed a word of limitation.

The cited case of *Algood and Withers* (b) indeed seems an anomalous decision. It arose on a deed of conveyance to trustees, of some lands in fee, and of other lands for the residue of a term, upon trust for W. for life, remainder to the heirs of the body of the said W. and of G. and M. and their heirs, executors and assigns; and it seems that the consideration of the circumstances, that the limitation to the heirs of W. was made to them,

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and

(b) *Supra*.

and the heirs of G. and M. jointly, so that all the heirs of the several persons were to take an interest of the same sort, and that the heirs of the body of G. and M. were to take an estate in fee, as appeared by the words of superadded limitation, and that the limitation to the heirs of the body of W. construed as words of limitation, would have given an estate tail, ruled the determination of this case.

Trusts *executory* are peculiar to *marriage articles*, and those instruments, whether deeds or wills, in which, by the express provisions of the instrument, the *trustees* are to *convey, settle, or assure* the lands, on which the instrument is to operate, or to *purchase* land with money entrusted to be laid out in a real estate; thereby shewing that the parties have a further conveyance in their prospect and contemplation. The mere circumstance that the party covenants to do an act, or directs a conveyance to be made, will not, of itself, make the trust executory. The conclusion that a trust is *executed* or *executory*, or that the limitations give *legal estates* must depend on the *quo animo*; on the previous question, whether another instrument is in the contemplation of

of the party, as the act which is to give full and complete effect to the principal object he has in view, which is always understood to be the case in *marriage articles*, stipulating for a settlement to be made in future, and in deeds and wills, directing that lands which are to be purchased, shall be settled or conveyed, unless the settlement or conveyance is to be made to *uses*, or upon *trusts*, the legal operation and effect of which are already fixed. That in a case thus circumstanced, the trust is not considered as *executory*, was decided in *Roe v. Aistrop* (i), and *Auston v. Taylor*; particularly in the latter of these cases; and that a trust will not be executory merely because the party covenants to *do an act*, is a distinction *clearly* deducible from all the cases on this learning, and is particularly illustrated by an instance in fact, and a decision upon the question, in *White and Thornborough* (k): and, indeed, the cited case of *Roe and Aistrop* is also an authority for the same conclusion. In *Roe v. Aistrop*, a settlement was made by the husband previous to marriage, of his freehold estates, to the use of himself and his intended wife for their lives and the life of the survivor,

(i) 2 Black. Rep. 1223.

(k) Ambl. 376. 2 Vern. 792.

vivor, and, after their decease, to the heirs *of the body of the settler*, on the body of his intended wife to be begotten, with remainder to his own right heirs; and in that settlement, he *covenanted* to surrender his *copyhold*, which was of inheritance, descendible by the custom of the manor to the youngest son, to the use of himself and his intended wife and their heirs of their two bodies to be begotten *in like manner*, and to the *same uses* as the freehold lands therein before mentioned were settled and conveyed; and, after the marriage, he surrendered the copyhold, to the use of himself and wife for their lives and the life of the survivor of them, and after their several deceases, to the use of the heirs of their two bodies, and for want of such issue, to the use of himself in fee. *De Grey* Ch. I. said it was a mighty clear case; and all the court agreed, that as the covenant for the surrender of the copyhold *referred to the uses declared of the freehold*, the word heirs in the article, could not be considered as a word of purchase, but must have its legal effect, according to the effect of that word in the limitation of the freehold lands.

And

And in *Austen v. Taylor* (1), a testator, after giving certain lands to trustees and their heirs, among other trusts, upon trust to P. for life, remainder to trustees *to preserve* &c. remainder to the heirs of the body of P. remainder to his own right heirs ; gave the residue of his personal estate to trustees, in trust to buy lands in fee-simple ; which he directed should remain, continue, and be, to, for, and upon *such* and the *like estate* and estates, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before devised, limited, and declared, of and concerning his *land* and premises therein before last devised, or as near thereto as might be, and the deaths of persons would admit : and the Lord Keeper was of opinion, that in the case of *imperfect trusts* only, that Court could make a different construction from a *legal* limitation. In that case, he said, there was no *reference to the trustees* ; without that ingredient, he did not find any case where the Court had given a different meaning from what a Court of Law would on a legal limitation. Nothing was left to the trustees to be done, but to buy the land. *The testator had declared the uses of the land when purchased.* And

(1) *Supra.*

And in *White and Thornborough (m)*, a man, with a view to his intended marriage, covenanted to levy a fine of freehold lands, and to surrender copyhold lands, to the use of himself for life remainder to his wife for life, remainder to his heirs males of his body by his wife, remainder to the heirs of their two bodies, and omitted to levy the *fine* or make the surrender; and Lord *Harcourt*, upon a rehearing, after a former hearing by him, in which he had considered the covenant as executory, the same as marriage articles, declared, that the covenant to levy the fine and declaring the uses thereof, was to be considered, *not as articles* but as a *defective settlement*, and, in that Court (the Chancery) to be of the same effect, as if the fine had been levied, and the surrender made; and that the uses were to be construed as in a perfect and complete settlement, and not to be varied or altered.

In construing marriage articles, and such other instruments as are *directory*, particularly deeds or wills, providing for a conveyance to be made *(n)*,

or

(m) *Supra*.

(n) *Trevor v. Trevor* 1 Eq. Abr. 387. 2 Brown's Par. Ca. 122. *Streetfield v. Streetfield*. Ca. Temp. Talb. 176. *Cusack v. Cusack*. 1 Brown's Par. Ca. 129. *Nandick v Wilkes*. 1 Eq. Abr. 393. c. 5. Gilb. Eq. Rep. 114.

or ordering money to be laid out in the purchase of lands (o), the *end* and *consideration* of the articles or other instruments, and the intent of the trusts are to be regarded; and in articles, *not followed up by a settlement made previous to the marriage*, or though there is such previous settlement, the same purports to be made in *purfuance* and *performance* of the *articles*, the limitation to the heirs will not be the subject of this rule, if the application of the rule will give the ancestor an estate tail, and enable him *solely*, by himself, to alien the inheritance to the prejudice of his children (p); for, in marriage articles, the unborn children are considered as purchasers for a valuable consideration, and the *very* objects of the intended settlement; and since a settlement that leaves the estate wholly in the power of the *settling parent*, would be nugatory, the Court of Chancery, merely *from the nature of the provision* (q), construes the words of limitation to the *heirs of the body*, to mean the *children* of the marriage and their heirs (r); ordering the limitations in the settlement

(o) *Jones v. Laughton*, 1 Eq. Abr. 392.

(p) *Honor v. Honor* 2 Vern. 658. 1 P. W. 125. *West v. Erisley* 2 P. W. 349. 3 Brown's Par. Ca. 327.

(q) *Streatfield v. Streatfield*, *Supra*.

(r) *Roberts v. Kingsley*, 1 Vez. 228.

settlement to be to the *first* and other *sons* in tail, with remainder to the daughters as tenants in common in tail, with cross remainders among themselves in tail; and interposing estates to trustees to support contingent remainders; or ordering the limitations to be less comprehensive, according to the extent of the words, descriptive of the heirs.

Articles carried into execution by a settlement made previous to the marriage without *any reference* by the *settlement* to the *articles*; and also those limitations in articles, which are of that nature that the settling parent cannot dock the intail, without the concurrence of the other parent; and those articles also, which, after making a provision for some issue of the marriage, as *sons* by the name of *sons*, giving them estates tail, and securing portions to the daughters, contain limitations to the heirs; and those articles also, which, by a *change of expression*, in different classes of limitation, shew that the settling party makes a distinction between the uses of the words *first* and other *sons*, and the words *heirs of the body*, or even uses the words heirs of the body differently, in different clauses of the same instrument

ment; are not within the reason, nor objects of the exception.

For in those instances in which the settlement is made *previous to the marriage*, without any reference to the articles, the settlement cannot be controuled by the *articles*; as some have thought, upon a presumption of a charge of intention (s); but it seems rather upon the ground of want of jurisdiction in the Court of Chancery.

And it has always been thought a sufficient and very prudent provision for the *issue*, at least for the occasions, of the *intended marriage*, that the limitations shall give *estates*, which, though they are of inheritance, do not confer a power of alienation, that can be exercised without the concurrence of the husband *and* wife; so that neither the *husband alone*, in the life-time of his wife, or *either* of them after the death of the other, can disinherit the issue; and, upon this ground, as often as the limitations in their *legal import*, will intitle the ancestors to interests or estates of this description, the Court of Chancery has declined to interfere, or interfering, has
allowed

(s) *Legg v. Goldwire*, Ca. Temp. Talb. 20.

allowed to the limitations, precisely the same effect that they would have in a legal conveyance; and therefore in those instances in which the tenor of the articles is, that the estate *of the intended husband*, or an estate *by his provision* according to the statute of 11 H. 7. (under which statute he must convey the estate, or procure the same to be conveyed, or the same must be purchased with his money) shall be so settled, that the *wife alone*, shall have an estate tail; as to the use of the intended husband for his life, remainder to his intended wife for her life, remainder to the *heirs of the body of the intended wife*, by her intended husband; which was the form of the limitations in *Honor* and *Honor (t)* and *Whately v. Kemp (u)*; or so that the *inheritance* shall be a *contingent interest* in each parent, and can never vest in the parent to whom it is limited; as to the use of the husband for life, remainder to the use of his intended wife for her life, and, after the deceases of them both, to the use of the *heirs of her body* by him, *if he survived her*, and, *if she survived him*, to *his heirs of his body*, on her body to be begotten, remainder to his own right heirs; which was the Case of *Highway* and others v.

Banner

(t) 1 P. W. 123.

(u) 2 Vez. 658.

Banner and others (v) ; the Court of Chancery will not vary or alter the words of limitation, but will suffer them to be inserted in the settlement, and have their full legal import and construction.

The first of these three cases arose on articles for a settlement, by the husband, of freehold lands of which he was seized ; the second on articles for the settlement of freehold lands, to be purchased with his money ; and the third on articles by a customary freeholder, to settle his customary tenant, held by copy of Court Roll ; and the two first of these cases clearly turned on the mere circumstance, that the *wife alone* was to have an estate of inheritance in lands of the provision of the husband, and therefore, it would not be in the power of the husband alone, or of his wife in his life-time without his consent, or after his death, without the consent of the *heir in tail*, or of the person next in reversion or *remainder*, to discontinue the estate tail, or make any alienation to the prejudice of her issue, the remainderman, or reversioner ; and the distinguishing circumstance of the last of these three cases, is, that
the

(v) 1 Brown's Ch. Ca. 584.

the inheritance was limited, so that it could not *possibly* vest in either of the parents while alive, but was necessarily to remain in contingency, as long as both the parents should be living, and immediately after the death of *either of them*, and not before, was to vest, and then vest in the heirs of that person, as his descendants; so that *neither* of the parents would *ever* have a power of lawful alienation, though the limitation to the *heirs*, was to give the inheritance as a contingent interest, to *one* of them.

The conclusion from these three cases is, that in the two former, the wife alone, to whom the inheritance was limited, and in the latter case, the husband or wife, (to one or the other of whom the limitation was, upon the contingency that the person who was to have the inheritance should *die* in the life-time of the other) had not, either of them, any *such* estate, as would put it in the power of that person *singly* to make any alienation *by way of conveyance*, to the prejudice of the issue; and it is in cases of this description only, and in no others, that limitations to the heirs of the body, as providing for *all the issue* of the marriage, are, in articles for a settlement, construed

construed to intitle the ancestor to the inheritance. For if the limitation in the articles to the heirs is in that form, that, according to the legal construction of the words of limitation, *either* of the parents *singly* may, in the life-time, or after the decease of the *other*, lawfully make any alienation to the prejudice of their children, the Court of Chancery will hold the words to be irregular, informal and used through mistake, and order a strict settlement to be made; and, therefore, as often as one of two persons, who are about to intermarry, either the man or woman, articles to settle land on themselves *jointly*, for a *joint* estate (*w*), or on themselves *successively*, for *several* and *distinct* estates (*x*); and by articles for a settlement by the *man*, there is to be a limitation to *his* heirs of his body (*y*), or the heirs of the body of himself and his intended wife (*z*); and by the articles for a settlement by the woman, there is a limitation to her heirs *of her body* to be begotten by her intended husband (*a*), or to the

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heirs

(*w*) *Streatfield v. Streatfield*, Supra. *Jones v. Laughton*,
1 Eq. Abr. 392.

(*x*) *Trevor and Trevor*, Supra.

(*y*) *Streatfield and Streatfield*, and *Trevor and Trevor*, Supra.

(*z*) *Cusack and Cusack*, Supra. *Nandick v. Wilkes*, Supra.

(*a*) *Jones v. Laughton*, Supra.

heirs of the body of the intended husband to be begotten by him on her body, or to the heirs of *their* two bodies (*b*), the limitations to the heirs will be construed to have the first and other *sons* in view, and the settlement will be ordered to be made accordingly; for since limitations to the heirs in this form will enable the intended husband alone, in all the instances in which the limitations are to *his heirs* of his body, or the *heirs* of the *bodies* of himself and his wife, and after the death of the husband, the intended wife *alone*, in all the instances in which the articles are for a settlement by her, the limitations are to *her* heirs of *her* body, or to *the heirs* of the bodies of *herself and her intended husband*, to make an alienation to the prejudice of the issue, if the words are allowed the construction they would receive *at law*, the Court of Chancery will interpose its power of correcting manifest mistakes into which the parties have fallen, and direct the settlement to be prepared with those forms of limitations, which will secure to the children &c. *certainly and effectually*, the provision evidently intended for them.

The

(*b*) *Burton v. Hastings*, Gilb. Eq. Rep. 113. Fearn 154.

The distinction that a limitation to heirs &c. may, in articles, be construed to give to the ancestor, the interest imported by that limitation, when a provision is made for *all the children* of the marriage in some manner or other; for *some* by the names of *sons*, for *others* under the appellation of *heirs*, is clear from the Case of *Powell and Price* (c), contrasted with that of *West and Errissey* (d). In *West and Errissey*, which was the first in order of time, the articles stipulated to *settle* lands, to the use of the intended husband for life with waste, remainder to the intended wife for life, remainder to the *heirs male* of the intended husband, by his intended wife, remainder to the heirs male of the body of the intended husband by any other wife, remainder to the *heirs female* of the intended husband by his said wife;—and leasing and jointuring powers were reserved to the intended husband: and on an appeal to the house of lords against an order of dismissal, made in the Court of Exchequer, it was decreed that the limitation to the *heirs females* intitled the *daughters* of the marriage to an *estate tail* by purchase; and the most probable

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grounds

(c) 2 P. W. 535.

(d) 2 P. W. 349. 3 Brown. Par. Ca. 327.

grounds of this decision, are that the expression heirs *females* contradistinguished to heirs *males*, did, in marriage articles, call for the same construction in favor of *daughters* that the expression heirs *males* is, in these sorts of instruments, allowed to have in favor of *sons*; that both descriptions of persons were, as far as any conclusion on that head could be drawn from the words of the articles, equally in the contemplation of the parties; and that no provision was made for the *daughters* besides that which they could claim under the limitation to the heirs female of the intended marriage.

In *Powel* and *Price* the articles provided for a settlement, to be made to the use of the intended husband for life, remainder to the use of trustees for his life, to support contingent remainders; remainder, as to part, to the use of the intended wife for her life, for her jointure, remainder, as to the whole, to the first and every other son of the marriage successively, in tail male, remainder to the heirs male of the body of the husband, under which limitation, as in *West* and *Errissey*, sons begotten by him on the body of any woman might have taken remainder to the heirs of his
body

body by his intended wife, remainder to the right heirs of himself; with a power to husband and wife to make leases; and a provision that if the husband should die without *issue male*, by his intended wife, and there should be one *daughter* she should have £3000. and if there should be *more daughters than one*, they should have £4000 among them: and these portions were secured on some part of the lands that were to be settled. And it was resolved that £3000 secured to the daughter, the only issue of the first marriage, by a settlement which the husband made on a subsequent marriage (he having, till that time, suffered the provision for the issue of the first marriage to rest wholly on the articles) was an actual satisfaction of all demands under the articles, and that though a limitation by articles to the *heirs male* of a marriage, after an express estate for life to the father, was taken to mean a remainder to the *first* and every other *son*, it did not follow that a limitation to the heirs of the body, must be equivalent to a remainder limited to daughters; especially in this case, where they were postponed to the heirs male of the body of the intended husband *by any wife*; and where there was an express pecuniary provision made

for the daughters by the first wife ; to which may be added, and this circumstance makes this case more clearly distinguishable from *West* and *Errissey*, where no notice was taken of *daughters* contrasted with *sons*, or of *females* contrasted with *males*, as the express objects of the provision made by the limitations of estates, and where care was taken of the daughters under that name, by a provision of a different sort.

And that there is an allowed and established distinction between those articles which do, and those which do not, by a change of expression, in the several classes of limitation, shew that the settling party makes a difference between the use of the words *first* and *other* sons, and the words heirs of the body, and even between the different use of the words heirs of the body in different clauses of the same instrument, is clear from *Powell* and *Price* already cited, and from *Chambers* and *Chambers* (e), and *Howell* and *Howell* (f) ; particularly the two last mentioned cases. In the former of these two cases, money in the hands of trustees, was articulated to be disposed of in the purchase

(e) Fitzgibbons 127. 2 Eq. Ca. Abr. 35. C. 4.

(f) 2 Vez. 358.

chafe of lands, to be settled on the intended husband for life, remainder to the intended wife for life, for her jointure, remainder to the *first* and *other* sons of the marriage in tail male, successively, chargeable with £2000 for younger children, remainder to the husband in fee; and, by the same articles, the father of the intended husband, covenanted to settle other lands on his said son and the *heirs male of his body*, remainder to the right heirs of himself, the father:—And in the latter of these cases, the articles were for a settlement of part of the land, on the husband for life, remainder to the wife for life, remainder, after the death of the survivor, to the heirs of the *body of the wife*; and of other part, on the husband for life, remainder to the heirs of his body, remainder to the wife. And it was said, in the first of these cases, by Lord Chancellor *King*, that by the articles, those lands which were comprized in the second class of limitation were not intended to be settled, as a provision for the children of that marriage; that they were taken care of by the other part of the articles, by the trust money; and that it was not like the common case of articles for a settlement on the issue of the marriage, where no *other provision* was made

for, or care taken of, them ; and that the *different* manner of *penning* the articles in relation to the trust money, and as to *those lands* ; the one to be in *strict settlement* to the first and other sons of that marriage, the other to be limited to the husband and his heirs male of his body generally, and not tied up to the *issue of that marriage* (b), shewed plainly that the parties understood, and had in contemplation, the difference between a *strict settlement* upon the *issue of that marriage*, and a *general settlement* upon the husband and the heirs males of his body ; and in the latter of these cases, it was said by Lord *Hardwicke*, that there was a *difference in the penning* of the two limitations ; that on the *first*, the parties might have it in view, to leave it in the power, not of the father *only*, but of both to vary ; that on the second, there would be no sense of the limitation, but as the son contended, which was to have the articles carried into execution strictly, to the first and every other son in tail ; that otherwise it would be in the power of the father, by fine, to bar it and defeat all the issue ; that it seemed a strong distinction on the face of the articles ; and that there had been cases adjudged on that distinction ; that as there

(b) See *infra*.

there was a difference in the penning of the articles; in one (should be, clause) of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a *reasonable* way.

In delivering his opinion on this case, Lord *Hardwicke* cited a case of articles for a settlement, of part of certain lands on the father for life, the wife for life, the first and other *sons* and *daughters* in tail; and of other part, on the father for life, and the *heirs male of his body* by his then intended wife; and stated Lord *Macclesfield* (who decreed to the father in tail, as to the lands comprized in the second class of limitations) to have said, by way of observation on that case, if that had been the sole limitation, he should, without scruple, decree in *strict* settlement, according to the common rule; but that where the parties had shewn they knew the distinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation.

Deeds and wills which create trusts that are executory, and shew an intention in the party, that his directions shall not be considered as
complete

complete, and conclusive, but rather as *minutes*, from which more full and more correct limitations are to be made, are open to the same observations, and intitled to the same construction; and in these instruments the word heirs will receive the same interpretation, in articles, as often as there is any trace of an intention to use this word, or, in wills, and perhaps in deeds too, the word issue, or other substituted word of the same import, *as words of purchase*. In these instances, the clause for exempting the ancestor from impeachment of *waste*; the insertion of trustees to support *contingent remainders*, or any like clause, furnishes evidence of such intention; and the case of *Leonard v. Earl of Suffex* (i) goes still farther; for in that case, the trust was, by one, and the same connected clause, to settle upon the ancestor *and his heirs of his body*, without any express estate for life, or any other controuling circumstances, besides directions that special care should be taken in such settlement, that *it should never be in the power of either of the sons*, (who are the immediate objects of the devise) *to dock the intail of either of their moieties* (the devise being made to them of moieties) *during their or*
either

(i) 2 Vern. 526.

either of their lives : on the other hand, according to the cases of *Sweetapple* and *Bindon* (k), and *Legate v. Sewell* (l), a distinction seems to have been taken between *executory* trusts in *wills*, and in *articles* for settlements. In the former of these cases, money was given to a daughter, to be laid out in land, and *settled* upon her and her children; and, if she died without issue, then over : and in the latter case, the devise was for settling lands on " A. " for life, and after his decease, to the *heirs male* of his body and the *heirs male* of the body of every " such heir male, severally and successively, as they " should be in priority of birth, and seniority of " age," remainder to B. and the rule proposed in the first of these examples, was that in case of a *voluntary* devise, the court must take the devise as they found it, and not lessen the estate or benefit of the legatee, although, upon the like words in marriage articles, it might be otherwise, when it appeared that the estate was intended to be preserved for the issue; and in the latter case, that where settlements were agreed to be made upon valuable consideration, the Court would aid in *artificial* words, and make an *artificial* settlement ;

(k) 2 Vern. 536.

(l) 1 Eq. Abr. 395. 1 P. W. 187.

complete, and conclusive, but rather as *minutes*, from which more full and more correct limitations are to be made, are open to the same observations, and intitled to the same construction; and in these instruments the word heirs will receive the same interpretation, in articles, as often as there is any trace of an intention to use this word, or, in wills, and perhaps in deeds too, the word issue, or other substituted word of the same import, *as words of purchase*. In these instances, the clause for exempting the ancestor from impeachment of *waste*; the insertion of trustees to support *contingent remainders*, or any like clause, furnishes evidence of such intention; and the case of *Leonard v. Earl of Suffex* (i) goes still farther; for in that case, the trust was, by one, and the same connected clause, to settle upon the ancestor *and his heirs of his body*, without any express estate for life, or any other controuling circumstances, besides directions that special care should be taken in such settlement, that *it should never be in the power of either of the sons*, (who are the immediate objects of the devise) *to dock the intail of either of their moieties* (the devise being made to them of moieties) *during their or*
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(k) 2 Vern. 536.

(l) 1 Eq. Abr. 395. 1 P. W. 187.

ment ; and the Chancellor added, he never knew it done for a *bare volunteer*. However in *Glenorchy v Bosville* (*m*), Lord Talbot said “ The rule is “ not generally true, that in *articles* and *executory* “ *trusts* different constructions are to be admitted.” Still there seems to be this distinction, that in *wills*, though creating executory trusts, there must be some expression, besides the mere limitation to the ancestor *for his life*, to enable the Court to discover, that the testator meant that the heirs should not take in that right, and under the strict technical import of that term ; while in articles for a settlement, which would leave the issue of the marriage, who are the objects of the settlement, wholly in the power of the settling parents, if the settlement was made in the *words of the articles*, the articles will be held irregular, informal, and the issue considered as objects of the provision, and as purchasers for a consideration that extends to them : and the court will decree a *strict* settlement, to secure to them the benefit of the provision, supposed by law to have been intended for them.

And

(*m*) *Supra*.

And from *Seal* and *Seal* (n) it is clear, that a direction that money shall be laid out in lands, and settled on one and his heirs males of his body, will not make the words descriptive of the heirs, to be a designation of *particular persons*. In that case a testator directed, that all his money in the government funds, should be laid out in a purchase of lands of 3 or £400 a year, and settled on his eldest son A. and the heirs male of his body, remainder to his second son B. and the heirs male of his body &c. And though it was insisted that this, being the case of money directed to be laid out in land, was to be construed like marriage articles, when lands are covenanted to be settled upon the husband and the wife and the heirs male of the body of the husband, in which case the Court would order a strict settlement, viz. to the father for life, remainder to the first &c. sons, to the intent the husband might not bar it; and for the same reason should do so here; the Lord Chancellor said this case differed; for that in marriage articles, the children are considered as purchasers: but in the case of a will, as this was, where the testator expresses his intent to
give

(n) 1 P. W. 290. Prec. in Ch. 421.

give an estate tail, a Court of Equity ought not to abridge the bounty directed by the testator (o).

And it will be obvious, that the case of *Legate* and *Sewell* already cited, is an authority for the same construction, under circumstances far more strong, in favor of a strict settlement; for in that case the ancestor was, by express limitation, to have an estate for life, and his heirs male were to take *after his decease*, and there were super-added words of limitation to the heirs male of every such heir male, and directions that the heirs male should take *severally and successively*, as they should be in *priority* of birth and *seniority of age*; and yet these circumstances in a will were not deemed sufficient to exclude the rule.

That the word *issue* may, *uno flatu*, be a word of purchase and limitation in a will creating trusts that are executory, is settled by the before mentioned case of *Glenorchy v. Bosville*. That case arose on a devise by a man to trustees, among other trusts, upon trust to convey the estate, after the marriage of his daughter with a protestant, to the use of his daughter for life without impeachment

(o) See also *Bale v. Coleman* 1 P. W. 145.

peachment of waste ; remainder to her husband for her life, remainder " to the *issue* of her body," with several remainders over ; and it was decreed by *Talbot*, Lord Chancellor, that the daughter should be only tenant for life with remainder to her first and other *sons* in tail.

And that the same word may have the same construction in *articles* for a *settlement*, is settled by *Hart v. Middleburst* (*p*). This case arose on articles for *conveying* lands, in trust for the husband for life, and afterwards to the issue of the match, in such manner and subject to such charges for younger children, as the husband should, by deed or will, appoint ; and Lord *Hardwicke* held that a daughter, the only issue of the marriage, was intitled, under an equitable execution of those articles in strict settlement, to an estate tail : *issue of the marriage*, he said, included *male* as well as *female* ; and, therefore, if it had gone no further than to the issue of the marriage, and a bill had been brought for carrying the articles into execution, the settlement must have been to *all the issue* ; to the *first* and every *other son*, and for default of such issue, to the *daughters*, with proper remainders

remainders following one after the other; and that he had known several decrees of that kind upon the words issue of the marriage.

With these observations the present essay will be concluded: it is submitted to the profession without any great expectation that it will be thought deserving of their patronage. The principal motive to the publication, has been the intimate connexion of this rule with a very considerable and important part of the subject of the Essay on the *Quantity of Estates* already offered to the profession. From the candour and liberality of those by whom alone books of this sort are read, and to whom alone they are interesting, the author is, from experience, satisfied, that he has every thing to expect; and though the reader may not discover any excellence in the work, he most probably will commend the attempt, as originating in laudable motives.

*I find in this work nothing which is not
contained in Mr. James's Annotations of the
same title in his Essay on Conting. Rem.
Vide p. 10.*



